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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Peter H. Kang, Magistrate Judge

IN RE: SOCIAL MEDIA)
ADOLESCENT ADDICTION/PERSONAL)
INJURY PRODUCTS LIABILITY)
LITIGATION)
) NO. 22-MD-03047 YGR (PHK)
)
)
)

San Francisco, California
Monday, May 6, 2024

REPORTER'S TRANSCRIPT OF HYBRID PROCEEDINGS

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Monday - May 6, 2024

1:47 p.m.

P R O C E E D I N G S

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THE CLERK: Court is now in session. The Honorable Peter H. Kang presiding.

THE COURT: Good afternoon.

ALL: Good afternoon, Your Honor.

THE CLERK: Now calling 22-MD-3047, In Re Social Media Adolescent Addiction and Personal Injury Products Liability Litigation.

Counsel, when speaking, please approach the podiums and state your appearance for the record.

THE COURT: All right. So we're here on the dispute over state agency discovery. Should we just go alphabetically, or do you have a different plan in mind for addressing the issues?

MS. MIYATA: Your Honor, Bianca Miyata for the State AGs.

We did think it made sense to go in a particular order, kind of on a spectrum for how states are structured with their representation. If given the choice, we'd prefer to start with Arizona, then go to New Jersey, Pennsylvania, Connecticut, and then California.

THE COURT: Any objection to that plan?

MR. CARPENTER: Ansel Carpenter from Covington &

1 Burling for the Meta defendants.

2 No objection to any order that the AGs want.

3 **THE COURT:** Okay. Let's start with Arizona, then.

4 **MS. MIYATA:** Thank you, Your Honor.

5 **MR. WHELIHAN:** Good afternoon, Your Honor. Nathan
6 Whelihan on behalf of the Arizona Attorney General's Office.

7 **THE COURT:** Good afternoon.

8 Okay. So let me just pull up the chart. I just want to
9 confirm, because it's been a few weeks, the chart.

10 So I just want to confirm this is -- I'm referencing the
11 chart which was submitted. I think it's Exhibit 1 to
12 Docket 738, the chart of agencies and which ones are going to
13 be represented by the respective Attorney General's Office.

14 So why don't you tell me, if you've got the chart in front
15 of you.

16 **MR. WHELIHAN:** I do have the chart in front of me.

17 **THE COURT:** Is the chart still accurate with regard to
18 the Arizona agencies?

19 **MR. WHELIHAN:** Yes, Your Honor.

20 **THE COURT:** All right. So then at least my first
21 question, Meta cites Arizona state law that says the Arizona
22 Attorney General's Office -- well, put it the other way --
23 agencies, except for three exceptions, which I'll get to, are
24 prohibited from employing legal counsel from outside the
25 Arizona AG's Office.

1 And so among -- putting aside the exceptions, on the
2 chart, you have the Department of Education for Arizona in
3 Category 1.

4 **MR. WHELIHAN:** Yes.

5 **THE COURT:** But they're not one of the exceptions from
6 that statute. So I don't understand that.

7 **MR. WHELIHAN:** Correct. If I may address that,
8 Your Honor.

9 First of all, I believe Meta's counsel slightly
10 mischaracterizes the prohibition that agencies not be
11 represented outside the Attorney General's Office. The
12 prohibition is on certain agencies not being allowed to expend
13 state funds to hire legal counsel or otherwise go outside of
14 their office to pay for legal counsel. So there's a slight
15 distinction there.

16 But the reason that the Arizona Department of Education
17 and also, I believe, the Governor's Office of Budgeting and
18 Strategic Planning are not on the list or are on the other side
19 of the list are because the Governor's Office -- Strategic
20 Budgeting and Planning is actually part of the
21 Governor's Office functionally in Arizona.

22 And then the Department of Education presents a sort of
23 unique present circumstance in Arizona, where the Arizona
24 Department of Education, the elected superintendent of that,
25 who heads that department, is himself a former attorney general

1 of the state and an attorney. He has brought lawsuits against
2 the Attorney General of Arizona and the Governor of Arizona in
3 their official capacities. So I think arising out of that
4 conflict, sort of a special exemption was granted to the
5 Department of Education.

6 Our Criminal Divisions within our office have also
7 indicted former employees of the Department of Education in
8 relation to fraud and misappropriation of state funds in
9 relation to the distribution of educational funds.

10 So the present reality on the ground is that that
11 department, for any kind of litigation matters, is not at all
12 represented by any agency counsel sections within our office.

13 **THE COURT:** Okay. Well, do you disagree with that
14 representation of the exemption for the Department of Education
15 of Arizona?

16 **MR. CARPENTER:** So a few points, Your Honor.

17 First, we think we correctly characterized the statute.
18 It does prohibit those agencies, which, as you pointed out, do
19 not include these three, from employing outside legal counsel
20 or making expenditures.

21 There are also other statutes we cite that say that the
22 Attorney General is the chief legal officer for the state and
23 has charge of that. And that's not cabined to certain
24 agencies. It includes the ones we've been talking about.

25 In terms of counsel's point about the conflicts, I don't

1 believe that counsel has represented that any conflicts would
2 matter in this case. And as I believe Your Honor knows from
3 the briefing, courts have rejected arguments about -- this sort
4 of argument that conflicts may exist when they're only
5 speculative, including the *Generic case* that we cite, which
6 applied it specifically to the Arizona Attorney -- or to the
7 State of Arizona and held that all state agencies are subject
8 to party discovery when the AG brings suit.

9 **THE COURT:** Okay. You didn't quite answer my
10 question, though.

11 Counsel for the AG -- Arizona AG represented that there's
12 some new exemption that allows the Arizona Department of
13 Education to exempt itself from the statute you've cited. Is
14 that correct or not?

15 **MR. CARPENTER:** I'm not aware of it, and I did not see
16 it in the briefing, Your Honor.

17 **THE COURT:** I didn't either.

18 So where does that special exemption for the Department of
19 Education arise from?

20 **MR. WHELIHAN:** A bit of a political question,
21 Your Honor. It didn't make our briefing due to the one-page
22 limit on the briefing. We wanted to include something on it,
23 but we felt that wasn't -- the chart spoke for itself.

24 The simple reality is that we don't represent them at this
25 time for litigation purposes. So...

1 **MR. CARPENTER:** Your Honor, if I may.

2 **THE COURT:** Sure.

3 **MR. CARPENTER:** I think if it didn't make the briefing
4 and we didn't have a chance to respond to it, then the Court
5 should deem it waived.

6 **THE COURT:** Well, okay. I'll give you a chance.

7 Is there a statute that was passed that grants the
8 Department of Education an exemption from --

9 **MR. WHELIHAN:** There is no --

10 **THE COURT:** Let me --

11 **MR. WHELIHAN:** Sorry. Excuse me. I'm sorry.

12 **THE COURT:** -- that grants Arizona the exemption from
13 Arizona Revised Statute Section 41-192?

14 **MR. WHELIHAN:** My understanding of the matter is that
15 it's more of an *ad hoc* exemption from the Governor's Office.

16 **THE COURT:** I see. Okay. Is there anything in
17 writing between the Arizona Attorney General's Office and the
18 Arizona Department of Education confirming that the Arizona
19 Attorney General's Office will not represent the Arizona
20 Department of Education in this matter in the future, no matter
21 what happens?

22 **MR. WHELIHAN:** There is -- not to my knowledge. And,
23 no, I don't think there would be a writing of the manner that
24 you describe, in any case.

25 **THE COURT:** Anything close to that that addresses --

1 **MR. WHELIHAN:** Not that I'm aware of.

2 **THE COURT:** -- failure to -- or refusal or failure,
3 whatever it is, non-representation of the Department of
4 Education by the Attorney General's Office?

5 **MR. WHELIHAN:** Not that I'm aware of, Your Honor.

6 **THE COURT:** Okay. So, thank you for that.

7 So is the Arizona Governor's Office of Strategic Planning
8 and Budgeting a separate agency from the Arizona
9 Governor's Office? What's your position?

10 **MR. WHELIHAN:** My understanding is that's also a
11 little bit of a weird -- a unique circumstance. It is
12 organized under the Department of Administration, is my
13 understanding; but functionally, it is staffed by and provided
14 representation by the Governor's Office. There's no -- it's a
15 quirk of the way it was set up, is my understanding from --

16 **THE COURT:** Hypothetically, if I were to rule in your
17 favor and find that they need to be subpoenaed, would they be
18 covered by a subpoena to the Arizona Governor's Office?

19 **MR. WHELIHAN:** I believe, technically, they are a
20 separate agency, and so there might need to be two subpoenas
21 there. But the counsel who would be representing them would be
22 the same -- my understanding is it would be the same counsel
23 who is employed by -- in the Governor's Office.

24 **THE COURT:** Okay. So if, technically, they're a
25 separate agency from the Governor's Office, then they don't get

1 the benefit of the exemption from the statute for outside
2 counsel; correct?

3 **MR. WHELIHAN:** Returning to the issue, I don't believe
4 the statute is, strictly speaking, sort of an exemption from a
5 situation, but it's an exemption from spending money. So
6 they're not spending money -- they're not spending any state
7 money to procure the legal counsel. They're using the legal
8 counsel of the Governor. It's a bit of a fine distinction, but
9 I believe there is a distinction.

10 **THE COURT:** Well, okay. You've got to take a position
11 one way or the other. Right? Either they are part of the
12 Governor's Office, in which case they get the benefit of the
13 exemption under the statute from the prohibition on
14 expenditures for other counsel; or they are not part of the
15 Governor's Office's, in which case they don't get the benefit
16 of that. But if you win on the merits, then it requires two
17 subpoenas. So pick one.

18 **MR. WHELIHAN:** I believe, practically speaking, they
19 are covered by the exemption under the Governor's Office.

20 **THE COURT:** Meta's view?

21 **MR. CARPENTER:** Your Honor, as counsel just said,
22 they're housed within a different department. When the
23 legislature said "Governor's Office," I think it meant what it
24 had called the Governor's Office in other statutes, not other
25 agencies.

1 **THE COURT:** This wasn't briefed and I didn't expect it
2 to be briefed, but does anybody have any legal authority for
3 whether the Arizona Governor's Office of Strategic Planning and
4 Budgeting has been found to be part of the Arizona Governor's
5 Office in any precedent anywhere? Anybody aware of that?

6 **MR. WHELIHAN:** This was something I came across in my
7 own research, trying to figure out how these agencies are
8 situated. I know that our office doesn't represent them.

9 My office's understanding, the agency counsel sections of
10 my office who handle representations of the agencies we do
11 represent in response to requests for specific help -- requests
12 for legal advice, my understanding is that -- my office's
13 understanding is that they are covered by the Governor's Office
14 and we do not represent them.

15 **MR. CARPENTER:** I don't have any legal authority for
16 you, Your Honor.

17 **THE COURT:** Okay. Going back, I forgot to ask this.
18 On the Arizona Department of Education, has the Arizona
19 Department of Education been involved in the investigations
20 leading to this lawsuit?

21 **MR. WHELIHAN:** No, Your Honor. The Department of
22 Education nor any of the departments have been involved in any
23 part of this investigation. None of them have any say in this
24 matter. None of them are directly implicated or interested in
25 this matter.

1 **THE COURT:** Just so I'm a hundred percent clear
2 because I want to make sure, when you said the chart is
3 accurate, so for purposes of this matter, the Arizona
4 Attorney General's Office is or will be representing the
5 Department of Child Safety, Department of Health Services, the
6 Office of Economic Opportunity, and the State Board of
7 Education?

8 **MR. WHELIHAN:** With the exception -- I would take
9 exception with the idea that we represent them in this matter.
10 As of now, we don't represent any of them in this matter.

11 The question that we answered -- the question that we
12 understood ourselves to be answering when we filled out the
13 chart was: If a subpoena were received by one of these
14 agencies, would someone in our office represent those agencies?

15 And the answer is yes, if Meta or someone else was to
16 serve a subpoena on these agencies, not absolutely, but in
17 all -- in all relative certainty, these agencies would likely
18 receive that subpoena, approach a separate division within our
19 office responsible for representing agencies, and that agency
20 would take an outside counsel-type relationship with the
21 department to respond to that subpoena in response to the
22 request from that department.

23 **THE COURT:** Those agencies have had some notice of
24 this current dispute, have they not? You've not communicated
25 with them in any way?

1 **MR. WHELIHAN:** Not to my knowledge, Your Honor. This
2 case was brought entirely by -- you know, I'm a member of the
3 Consumer Protection and Advocacy Section within
4 the Attorney General's Office. At no point in time did I
5 coordinate or did anyone else that I'm aware of coordinate with
6 any of the outside agencies.

7 We have independent authority, and we're an independent
8 executive agency that pursued this claim. We have -- we are
9 not representing any of these agencies, whether or not in this
10 matter or at this point in time.

11 **THE COURT:** So the arguments that you're advancing
12 would block the discovery directly to those agencies; and
13 therefore, you're arguing on their -- I mean, you're advancing
14 their interests in this matter, aren't you, whether you're
15 actually formally representing them?

16 **MR. WHELIHAN:** I don't think that we're -- we are
17 advancing the interests of the consumers of the State of
18 Arizona, the young users of Meta's platforms. To the extent
19 that we benefit society, we aim to benefit society, we aim to
20 benefit those users, there may be some ancillary benefits that
21 flow to other state agencies. But we are not representing any
22 of the interests of any of the other state agencies directly
23 or --

24 (Stenographer interrupts for clarification of the record.)

25 **MR. WHELIHAN:** -- not representing any of the

1 interests of any of the outside third-party state agencies
2 directly.

3 We don't intend to seek any civil penalties that would
4 flow to them. We don't have any damages that we attribute to
5 them.

6 **THE COURT:** Really, with regard to this current
7 discovery dispute --

8 **MR. WHELIHAN:** Yes.

9 **THE COURT:** -- the arguments you're advancing align
10 with and advance the interests of these agencies, don't they?

11 **MR. WHELIHAN:** You're saying that the --

12 **THE COURT:** For this discovery dispute, not the case
13 as a whole.

14 **MR. WHELIHAN:** I'm not prepared to speak to what their
15 interests are. All of these agencies are independent agencies,
16 either controlled by the Governor's Office or their own elected
17 officials or their own boards. Their interests are their own.

18 And they -- to the extent they wish to assert their
19 interests in response to this discovery dispute, that would be
20 a bit of a theoretical exercise were they to be involved. To
21 my knowledge, none of them are aware of this discovery dispute;
22 so I don't know what their interest would be.

23 **THE COURT:** A question for Meta. The document
24 requests that you're trying to -- that are the basis for this
25 dispute, did they list out the agencies as part of the

1 definition of "You" who should be responding to the document
2 requests?

3 **MR. CARPENTER:** I believe so, Your Honor, but I'll
4 need to double-check.

5 They did.

6 **THE COURT:** Could you hand up a copy if you've
7 got one?

8 **MR. HALPERIN:** Your Honor, I'll check my binder and
9 see if I have one. I'm not positive I do.

10 **THE COURT:** If you don't have one, then maybe
11 e-mail one to the PHK P.O. box. That wasn't in the materials
12 that was -- and I didn't expect it. It'd just be nice to see
13 whether the document requests named the agencies at issue or
14 not.

15 So on the -- maybe you know. If the document requests
16 named the agencies at issue, I'm a little surprised they didn't
17 get any notice of this discovery dispute.

18 But if you're not here -- if you're saying the arguments
19 you're making don't even align with their interests, shouldn't
20 counsel for the agencies have shown up?

21 **MR. WHELIHAN:** Your Honor, the way the State of
22 Ariz- -- the way that the Attorney General's Office of Arizona
23 brings these matters, we don't bring them in coordination with
24 any of the other agencies.

25 **THE COURT:** Not my question. The discovery --

1 according to counsel for Meta, the discovery requests -- the
2 reason we have this dispute is it named who Meta believes
3 should be responding to the discovery requests, including the
4 agencies. Let's take that as a given.

5 **MR. WHELIHAN:** Okay.

6 **THE COURT:** Assume you don't dispute that. All right?
7 Let's assume that that is the case. And if it's not the case,
8 I'm going to be very upset at Meta for making that
9 representation.

10 But assuming that the document request lists or names the
11 agencies, I mean, shouldn't -- I'm surprised that, just as a
12 matter of at least courtesy, you wouldn't have given the
13 agencies a heads-up that this dispute -- I mean, we've been
14 arguing about this issue and having multiple hearings on this
15 issue, and I am surprised that you didn't let the agencies
16 know. And if you did let the agencies know, I'm surprised they
17 didn't show up to advance their own interests if you're taking
18 the position that you're not advancing their interests here.

19 **MR. WHELIHAN:** Meta's original set of 45 RFPs that
20 were served upon us were so broad as to include every part of
21 the state in the "You," I believe. Their more recent RFPs
22 served last Friday did specify the nine agencies they
23 identified for Arizona.

24 They treat the nine agencies, in the most recent RFPs
25 propounded on Friday, as parties. We dispute the idea that

1 those agencies are parties. We have no normal course of
2 business, course of proceeding that would inform any of these
3 agencies of our consumer protection actions. It would really
4 be an unprecedented and un- -- it's just something we don't do.

5 So I understand your point. I take your point that it
6 might be common courtesy to let these agencies know; but if we
7 were to let these know -- whether or not agency counsel
8 represents these agencies in other contexts, to reach out to
9 the Governor's Office or to other agencies and tell them that
10 Meta is telling us that they are parties in a dispute we don't
11 believe they're parties to, I'm not sure what the -- I'm not
12 sure where that would go, ultimately.

13 **THE COURT:** All right. So let me make one thing
14 absolutely clear. You raise a point. I'm not here to decide
15 whether these non-parties are parties to the case. That is not
16 the dispute in front of me.

17 And everyone should be absolutely clear, the issue in
18 front of me, before me is whether the parties to the case have
19 control under *Citric Acid* such that they are obligated to go
20 get the documents from these non-parties.

21 Whether anybody is arguing that some unnamed party is
22 actually a party for purposes of the case, that is not --
23 (a) it's not a discovery dispute so it shouldn't be presented
24 to me; (b) it's not something I need to decide, nor do I think
25 it's appropriate for me to decide with respect to Rule 34 and

1 *Citric Acid*; and (c) when we talk about whether these other
2 agencies are, quote, parties to the case, I want to be
3 absolutely clear, I'm only and you should only be referencing
4 that in connection with whether discovery is available from
5 them under the control test for *Citric Acid*, not for any other
6 purposes in the case. So I just want to make that clear.

7 Is there any dispute as to what we're actually here to
8 decide?

9 **MR. CARPENTER:** We agree, Your Honor, that that's the
10 question.

11 **THE COURT:** Okay. So is it a hundred percent clear,
12 whether it's a political decision or whatever, but just as
13 refers to this case, the Arizona Attorney General's Office will
14 not, never be representing the Board of Regents, the
15 Commerce Authority, the Department of Education, the
16 Governor's Office, or the Governor's Office of Strategic
17 Planning and Budgeting in this matter, no matter what?

18 **MR. WHELIHAN:** Yes, Your Honor, in all reasonable
19 likelihood, that's correct.

20 **THE COURT:** Okay. Your brief argued that the decision
21 in *Generic Pharmaceuticals* led to some later meet and confer
22 that then led to an agreement to find that the Arizona Attorney
23 General's Office had complied with its obligations and was not
24 required to produce records from any other agencies. There's
25 no citation to that, and so I don't see that in the record

1 before me.

2 **MR. WHELIHAN:** Understood, Your Honor. That was just
3 the result of conversations with our antitrust counsel, trying
4 to get a back on on what ultimately happened in that case.

5 **THE COURT:** But whether parties later negotiated away
6 a discovery dispute doesn't vitiate or undermine or somehow
7 reverse the district judge's opinion in that case; correct?

8 **MR. WHELIHAN:** Correct.

9 **THE COURT:** Okay. And just so I'm clear, I asked
10 about the Department of Education, but do any of the other --
11 or were any of the other agencies we talked about -- the
12 Governor's Office, the Office of Strategic Planning and
13 Budgeting, Board of Regents, or Commerce Authority -- were any
14 of them at all involved in investigating or preparing this
15 case?

16 **MR. WHELIHAN:** Not at all, Your Honor, no.

17 **THE COURT:** Well, you've answered all my questions
18 about Arizona. In the interest of time, please don't repeat
19 arguments in the briefing. So if there's anything more you
20 want to let me know about, now is your chance.

21 **MR. WHELIHAN:** Thank you, Your Honor, if I could.

22 Briefly, I appreciate the clarification that we really are
23 here just to talk about the *Citric Acid* question. I was a
24 little bit uncertain on that based on the RFPs propounded by
25 Meta.

1 To speak to the *Citric Acid* question of whether our office
2 has the right on demand -- right to obtain documents on demand
3 from these third-party state agencies, I think the fundamental
4 principle -- and I'm trying not to --

5 (Stenographer interrupts for clarification of the record.)

6 **MR. WHELIHAN:** -- the fundamental question in Arizona
7 is -- centers on whether or not the Arizona Attorney General
8 has the statutory authority granted to her to do something like
9 that.

10 Article 5, Section 9, of the Arizona Constitution states
11 that the powers and duties of the Attorney General shall be as
12 prescribed by law.

13 The cases we cited in our brief are settled law that show
14 that that means that the Arizona Attorney General possesses the
15 powers -- only those powers granted to her by statute. She
16 doesn't have any common law authority. She doesn't have any
17 extra-statutory authority of any kind. So even if there's an
18 affirmative statute that grants powers to someone, if that
19 statute doesn't specifically grant them to the
20 Attorney General, we can't make the argument that she has those
21 powers.

22 So I think the inquiry and the question of -- in order to
23 answer the question of whether or not we have the right to
24 obtain documents upon demand, the inquiry really has to focus
25 on whether there is an affirmative statute granting the

1 Attorney General the power to do so.

2 And I think the answer to that question is a
3 straightforward answer. There is no statute that gives the
4 Attorney General a broad, general power -- or specific power in
5 this instance, in this matter -- to access or compel the
6 production of documents in the control and possession of these
7 independent agencies.

8 So the argument that Meta has advanced that the absence of
9 a prohibition somehow serves to empower the Attorney General
10 just doesn't make sense in Arizona. And I think that is really
11 the crux of the issue in Arizona. We don't have that
12 authority.

13 And what that means functionally for this case is that if
14 we were to be ordered to produce documents on behalf of any of
15 the nine state agencies, whether or not we represent them, we
16 would be left in a position where we really would have no good
17 option or way to do so. We would be left in kind of the same
18 position that Meta is in, only worse, because, you know, our
19 options would be to either serve a public records request on
20 the agencies, in which case the documents that were produced
21 would not be usable as evidence; we could try to serve
22 subpoenas of our own, but we don't think that we have the
23 statutory authority to do that. It would be unprecedented.

24 We would anticipate --

25 **THE COURT:** Let me stop you.

1 I mean, in *Generic Pharmaceuticals*, your office was found
2 to have control over other state agencies. So it's not
3 unprecedented.

4 **MR. WHELIHAN:** But we never had to get those
5 documents, and that's why we pointed that out in the brief,
6 what you raised earlier. I know there's no decision -- it
7 didn't overturn a decision. It was just explaining that we
8 never had to actually go and do it.

9 And so it's something that, for the sake of efficiency,
10 for the sake of moving this forward -- you know, our office
11 very much believes that it's important to move this case
12 forward with all due speed; and if there's an order that we
13 have to produce documents, kind of stand in Meta's shoes and
14 get these documents from third-party agencies, it's going to
15 cause significant delay, significant waste, and significant
16 inefficiency.

17 So for that reason, you know, it's just not a readily
18 doable thing for the Arizona Attorney General.

19 **THE COURT:** Let me ask, Mr. -- it's "WELL Ih Han"?

20 **MR. WHELIHAN:** "WHEEL Ih Han."

21 **THE COURT:** Whelihan. Sorry.

22 Are you a member of the Bar of the State of California?

23 **MR. WHELIHAN:** I am. Inactive.

24 **THE COURT:** Okay. So you're an active member of the
25 Bar of the State of California.

1 Were you admitted *pro hac* in this case?

2 **MR. WHELIHAN:** Yes.

3 **THE COURT:** Okay. So what Arizona statute empowers
4 the Arizona Attorney General to enter *pro hac vice* motions in
5 federal court in California?

6 **MR. WHELIHAN:** I am not aware of one, Your Honor.

7 **THE COURT:** So, but yet you're doing it; right?

8 **MR. WHELIHAN:** Yes.

9 **THE COURT:** And you're not -- you would not concede
10 that you were somehow exceeding the authority of the Arizona
11 Attorney General by appearing as counsel in this case; correct?

12 **MR. WHELIHAN:** No, Your Honor.

13 **THE COURT:** Despite the absence of an expressly
14 authorizing statute; correct?

15 **MR. WHELIHAN:** Certainly, Your Honor.

16 **THE COURT:** Right.

17 More generally, an attorney who is representing a client
18 in federal court has an obligation under the Federal Rules of
19 Civil Procedure to do a reasonable search for and produce
20 documents in response to document requests under Rule 34 and
21 Rule 26; correct?

22 **MR. WHELIHAN:** And we're glad to do that, Your Honor,
23 for the documents that we have control of.

24 **THE COURT:** Right. Well, that's the point.

25 You would agree that a client has control over documents

1 in their attorney's possession; correct?

2 **MR. WHELIHAN:** Yes, Your Honor.

3 **THE COURT:** Okay. Here, it's a slightly different
4 situation because you are both a party and a legal service
5 provider at the same time; correct?

6 **MR. WHELIHAN:** If you're looking at our office as a
7 whole, then, yes, we are a legal service provider. Parts of
8 our office provide legal services to some of these agencies,
9 yes.

10 **THE COURT:** Yeah. So in the situation for those
11 agencies such as the Arizona Department of Health Services,
12 which your office is representing if a subpoena were issued or
13 is representing --

14 **MR. WHELIHAN:** Yes.

15 **THE COURT:** -- for purposes of this case, you would
16 have an obligation, in fact, under the Federal Rules of Civil
17 Procedure, as counsel here, to go search for and obtain
18 documents from your client; correct?

19 **MR. WHELIHAN:** Our position, Your Honor, is that what
20 would happen there is that department would have its own
21 interests. They -- if they were to push back against the
22 production, we wouldn't have any reasonable way to compel them
23 to do so. They would be represented by agency counsel sections
24 within our office, and then my section would be forced into the
25 position of arguing things like burden and the scope and the

1 search terms against another part of my own office on behalf of
2 their representation of a third-party state agency. And I
3 don't think that kind of situation lends itself to any kind of
4 efficiency or timely discovery.

5 Meta knows better the questions it wants to ask of these
6 agencies. They propounded 45 very broad -- well, some of them
7 are very broad -- requests for production. It's difficult for
8 us to discern -- some of them, on their face, are very clear
9 what they're asking for and where we would get it. Some of
10 them would require, you know, a more targeted approach. We
11 don't think Meta wants to ask all, now, 49 questions of all
12 nine agencies they identified that they are interested in.

13 So for the sake of efficiency and for the sake of moving
14 this case forward, Meta stands in a much better position than
15 we would to compel production and to get the documents that
16 they wanted from these third-party agencies.

17 **THE COURT:** Not really an answer to my question.

18 For purposes of this case --

19 **MR. WHELIHAN:** Yes.

20 **THE COURT:** -- assuming -- well, as counsel for, for
21 example, the Department of Health Services, you'd have an
22 obligation as counsel to obtain documents from your client,
23 just like any counsel has an obligation to obtain documents
24 from their clients in response to document requests.

25 **MR. WHELIHAN:** I would say that the Department -- I

1 don't represent them. They're not -- the Attorney General's
2 Office is not representing that agency in this matter. So --

3 **THE COURT:** Okay. The --

4 **MR. WHELIHAN:** Or the state as a whole.

5 We represent the Attorney General's Office bringing a suit
6 under the Arizona Consumer Fraud Act and the COPPA statute for
7 the office. We're not bringing it on behalf of any of these
8 agencies. These agencies aren't involved in the
9 decision-making process. Yes.

10 **THE COURT:** I'm not talking about -- I don't care
11 about the merits part of the case. I'm talking about this
12 discovery dispute. Right?

13 So for purposes of this discovery dispute, the agency --
14 for example, the Department of Health Services -- you must
15 represent them under Arizona law; no?

16 **MR. WHELIHAN:** They can represent themselves, or they
17 can get counsel to represent them, as long as they don't spend
18 state funds on that counsel.

19 **THE COURT:** Okay. But you put them in Column 3,
20 saying that you were going to represent them if it came to
21 that.

22 **MR. WHELIHAN:** We did that in the interest of being
23 the most forthcoming with the Court. We could have put them in
24 the middle column, saying that: Well, it depends on the
25 situation.

1 Theoretically, these agencies could decide not to -- if
2 they get a subpoena, they can respond to it without approaching
3 our office; but when I spoke with agency counsel, they said
4 they would; so I put them in the column of we would.

5 **THE COURT:** I expect you to be forthcoming with
6 the Court. So I appreciate that.

7 But, I mean -- okay. Stepping back, you agree that in
8 litigation, counsel has an obligation, when they receive a
9 document request from an opposing party, to go get documents
10 from their client.

11 **MR. WHELIHAN:** Yes, I agree with that.

12 And I would say that those agencies are not a client at
13 this point in time. They're not a client for this matter.

14 They come to us with -- they want advice. They come to us
15 and they're a client for that purpose. And another part of the
16 office handles them, and they have the same kind of
17 attorney-client relationship that an agency would have if they
18 would go out and hire a private third-party law firm.

19 It would be like asking counsel for Meta to produce
20 documents from clients that they represent in other matters.
21 We don't expect them to do that because they're not
22 representing those clients here.

23 **THE COURT:** But the difference -- that analogy --
24 again, it's like I said, you're both a party and a legal
25 services provider. There would be ethical problems with a

1 private firm that was itself a party to a case then trying to
2 represent another party, which is -- that's why the -- I
3 understand the argument you're making, but I think the analogy
4 doesn't hold up because of the unique posture of this case,
5 where you've got your office both here essentially wearing two
6 hats at the same time.

7 Okay. All right. Anything further on Arizona?

8 **MR. CARPENTER:** Yeah. If I could just briefly respond
9 to a little bit of that.

10 **THE COURT:** Sure.

11 **MR. CARPENTER:** And I'm mindful of the Court's
12 admonition not to retread the briefing, and so I'm --

13 **THE COURT:** I've read the briefs.

14 **MR. CARPENTER:** Thank you. Yes, Your Honor.

15 Just a few points. One is just to clarify my earlier
16 comments about *Citric* and control.

17 We have argued in the course of this that because the
18 state, we think, is the party in sum and substance, state
19 agencies are subject to discovery on that basis.

20 But I understand that today what we're focused on, what
21 the latest round of briefing is focused on is how state
22 statutes are set up and how the *Citric* control test interacts
23 with that.

24 The second point I want to --

25 **THE COURT:** Let me stop you there.

1 So, again, you may have tried to argue that or taken that
2 position in your document requests, that because the state and
3 the agencies are somehow -- what did you say? -- are in sum and
4 substance the same thing, that's not part of the *Citric* test,
5 is it? There's nothing under *Citric* that tells me I need to
6 decide that issue; correct?

7 **MR. CARPENTER:** So I think that that's what we argued
8 in earlier sets of briefing on this. And *Citric* didn't address
9 a situation like this, but courts, as we cited in those briefs,
10 have taken that tack. Now, another is what we're doing today,
11 which is to look at the statutory frameworks for access.

12 But a number of courts have held that when the AG sues on
13 behalf of the state, that is a suit by the state; and so
14 because state agencies are just a part of a state, they are
15 subject to party discovery on that basis.

16 **THE COURT:** That's not the law in the Ninth Circuit,
17 is it?

18 **MR. CARPENTER:** I'm not aware of a Ninth Circuit case
19 saying that, but I don't think that *Citric* disagrees with it.
20 *Citric* just says if there's a legal right to obtain, then you
21 have possession, custody, or control.

22 And one way that they would have a legal right to obtain
23 is if the state were the party before Your Honor today, which
24 we believe they are; and because of that, state agencies, as a
25 part of a state, their documents can be obtained.

1 **THE COURT:** I'm not here to decide whether agencies
2 are parties to this suit. If you want to join them as parties,
3 you've got to file a motion for joinder with Judge Gonzalez
4 Rogers.

5 **MR. CARPENTER:** Understood, Your Honor. I just wanted
6 to make clear our position on that issue.

7 **THE COURT:** I want to make clear the scope of what I'm
8 deciding here.

9 **MR. CARPENTER:** Understood.

10 **THE COURT:** Okay. Anything further?

11 **MR. CARPENTER:** Counsel also referenced that it would
12 be more efficient for us to propound document requests to all
13 of the 270-something agencies at issue.

14 **THE COURT:** You mean subpoenas?

15 **MR. CARPENTER:** Yes, Your Honor. Apologies.
16 Third-party subpoenas.

17 As courts, I think, have recognized, it is much more
18 burdensome to do that. It is much more efficient for the
19 Attorney General to simply exercise the authority that it's
20 given to carry out its role advising and representing state
21 agencies and to go get those documents from the state agencies
22 themselves.

23 I think counsel also said at some point that "It would be
24 represented by our office but a different section."

25 I'm not aware of any court ever endorsing the idea that

1 because the Attorney General's Office has decided to divide
2 itself into different sections, it can then cordon off the
3 documents that would otherwise be properly discoverable.

4 Finally, I think that counsel referenced that we hadn't
5 cited any statutes or cases in our briefs saying that the
6 Arizona Attorney General has access to state agency documents
7 for these purposes.

8 We don't think we need a statute saying that because, as
9 the decisions we've cited say, what courts are looking at
10 instead is, under the state statutory framework, does the
11 Attorney General have the authority, or maybe even the
12 obligation, to represent the state and is there a statute that
13 would otherwise prohibit them from accessing the documents?

14 So just as with the PHV example or any number of other
15 examples, we don't think we need to point to a very specific
16 statute that says that thing, and I think courts have agreed
17 with us.

18 **MR. WHELIHAN:** Thank you.

19 Two things, Your Honor.

20 First, I think, counsel said we can't -- well, he used the
21 phrase "can't cordon off the different divisions and sections."

22 I think it's ethical rules; it's the rules of being an
23 attorney. There are times when there are conflicts, and parts
24 of our office represent agencies in ways that conflict with
25 other parts of the office and we have to set up ethical walls.

1 That's just the nature of the way the office is structured and
2 built. So, you know, I'll make that point.

3 And then the cases cited, the *Generic Pharmaceuticals*
4 matter, there was that ruling in Arizona that we have control
5 of the documents. As a preliminary matter, we think that that
6 was held wrongly even in that case; but if you're -- for one
7 thing; but also, that matter was in an antitrust context.

8 I think we can distinguish the consumer protection context
9 slightly here because in the antitrust context and in some of
10 the other contexts in the cases cited by Meta, the harms
11 alleged in those cases were more directly tied to harms that
12 were caused to the agencies. Right?

13 So if there's an antitrust, if there's a price-fixing or
14 there's collusion that results in AHCCCS -- that's
15 A-H-C-C-C-S -- the Arizona Medicaid agency, paying too much for
16 a drug and that's what we are alleging as the Attorney
17 General's Office, it's a little bit more fair to require us to
18 prove and to show the documents that show that they're being
19 overcharged. Right?

20 In this matter, we allege no harm to any of these agencies
21 individually or generally. Some benefit will flow to these
22 agencies by virtue of what we are hoping to achieve for the
23 users themselves, for the Arizona consumers. But we're not
24 saying that the Department of Public Safety -- or, excuse me --
25 the Department of Child Protection has been harmed X amount of

1 dollars or that Meta has been overcharging them or that Meta
2 has been causing them to take more children out of people's
3 homes. So in this case, we don't have that same causal
4 connection.

5 **THE COURT:** Under Arizona law, if, at the end of all
6 this, monetary relief is awarded in some form to your client,
7 is any of that money allocated or shared in any way by any of
8 the other agencies?

9 **MR. WHELIHAN:** Under the statutes of the Arizona
10 Consumer Fraud Act, there's a couple of different revolving
11 funds. Civil penalties would go to the Consumer Protection --
12 Consumer Protection/Consumer Fraud Revolving Fund. That fund
13 is generally used to fund our office. Restitution, although
14 we've already forgone that, there's a different fund for that.
15 There's different funds that they would go to. None of the
16 funds directly go to any of these agencies.

17 **THE COURT:** Does the rest of the money go to some
18 general fund, or how does the rest of the money --

19 **MR. WHELIHAN:** The way it works is that -- well,
20 again, it's different for each of the funds. It's rather
21 complicated. But the main fund for, say, civil penalties, we
22 use it to fund our own office. We use it to fund the Criminal
23 Division, so on and so forth.

24 By statute, that money -- I believe it is any amount over
25 \$5 million can be swept by the legislature in certain

1 circumstances. So it's theoretically possible that some of the
2 money could go to the general fund, but it's not -- that's not
3 normally where it would go, but it is theoretically possible.

4 **THE COURT:** Counsel, you admit that the burden is on
5 Meta to show control here?

6 **MR. CARPENTER:** Yes, Your Honor.

7 **THE COURT:** And you haven't cited and I haven't seen
8 anything from Meta arguing or showing that Arizona has injected
9 documents or information from these other agencies into this
10 case; so I assume there is none. Correct?

11 **MR. CARPENTER:** Correct, Your Honor. But I think that
12 is part of what we would want to learn in discovery. And
13 I think if that issue goes anywhere, it goes to relevance. But
14 it doesn't affect the threshold legal question of whether those
15 documents are subject to the AG's possession, custody, or
16 control.

17 **THE COURT:** Well, I mean, your colleague has argued
18 that the *Generic Pharmaceuticals* case is distinguishable on the
19 basis that in that case, documents and information from the
20 other agencies were injected into the merits of the claims and
21 were relevant in some way, came up in some way on the merits of
22 the case. You agree that's not the situation here?

23 **MR. CARPENTER:** That is not the situation here, but I
24 don't think that that's a distinction that matters for present
25 purposes. *Generic's* reasoning didn't depend on that. It's

1 true that, as a factual matter, the agencies that they chose to
2 look into there were ones that had to do with drug overpayment.
3 But, again, I think that would be an issue in this case of
4 which are relevant and which aren't, which can be litigated in
5 the ordinary course of discovery. But *Generic's* reasoning just
6 looked at Arizona's statutory framework, the AG's authorities,
7 how they interact with it, and ruled that there is control.

8 **THE COURT:** In the Third Circuit and in Pennsylvania,
9 one of the factors that those courts look to for control is
10 practical ability to access the documents; is that right?

11 **MR. CARPENTER:** My understanding is that, yes, in some
12 circuits, sometimes they also look at practical ability.

13 **THE COURT:** And is practical ability a factor
14 available in the Ninth Circuit?

15 **MR. CARPENTER:** Under Ninth Circuit law, it is legal
16 right to obtain. Now, it wouldn't surprise me if the AG also
17 did have a practical ability to obtain a lot of these
18 documents. But our briefing is focused solely on the legal
19 right test and applied the same factors that *Shelby County* and
20 *Generic* and other cases have applied.

21 **THE COURT:** Anything further?

22 **MR. WHELIHAN:** I don't think so, Your Honor.

23 **THE COURT:** Submitted?

24 **MR. WHELIHAN:** Thank you. Yes, Your Honor.

25 **MR. HALPERIN:** Your Honor, just as a matter of

1 housekeeping, I have e-mailed to Your Honor the RFPs served,
2 both the first and second set. The definition of "Plaintiff"
3 and "You" specifically identifies the agencies.

4 **THE COURT:** Okay. Thank you. Thank you for that.

5 Just since you're up here, is that true for all the states
6 that we're concerned with for purposes of this dispute?

7 **MR. HALPERIN:** Yes, it is, Your Honor. We have sent
8 you, for all 35 states, the RFPs. The first set is identical
9 across the agency -- or across the states, rather. The second
10 set has individual RFPs, but the definition of "Plaintiff" and
11 "You" is the same.

12 **THE COURT:** Okay. So submitted as to Arizona.

13 Remind me who's next.

14 **MR. WHELIHAN:** New Jersey. I'm sorry.

15 **MS. WANG:** Mandy Wang on behalf of the New Jersey
16 Attorney General and the New Jersey Division of Consumer
17 Affairs.

18 **THE COURT:** Good afternoon.

19 **MS. WANG:** Good afternoon, Your Honor.

20 **THE COURT:** Okay. So Meta has cited law -- I think
21 you may have cited law as well -- that under New Jersey state
22 law, the Attorney General is the sole legal adviser to agencies
23 in New Jersey. Is everybody agreed that that's the law in
24 New Jersey?

25 **MS. WANG:** Yes, Your Honor.

1 **THE COURT:** Okay. And I believe if we look at the
2 chart -- one, two -- three of the New Jersey agencies are in
3 what are called Category 3, which is that your office would
4 represent them in the event of a subpoena; and then -- one,
5 two -- two are in the middle category, which is it depends.

6 Given the New Jersey statute, how can it depend?

7 **MS. WANG:** So if it's possible to clarify the state
8 organizational structure a little further.

9 The New Jersey Constitution, Article V, Section IV, allows
10 for the Governor to create principal departments within the
11 executive branch. And so, many of the agencies that Meta has
12 identified are these top-level agencies. The Department of Law
13 and Public Safety, of which the Attorney General is the head,
14 is also one of these top-level agencies. None of the agencies
15 that Meta has identified fall underneath the AG's control in
16 that vertical structure.

17 And so we have asserted that only those agencies that
18 are -- that fall under that vertical structure, which includes
19 my client, the Division of Consumer Affairs, which is the
20 agency that has brought suit in this case, is the only
21 appropriate party for which Meta may seek discovery. And all
22 of the other agencies are either top-level agencies or
23 subdivisions of those other principal departments.

24 **THE COURT:** Okay. That didn't answer my question,
25 though.

1 So you've got two agencies from New Jersey that are in the
2 middle category. I misspoke before. Actually, it's -- one,
3 two, three, four, five, six -- seven agencies that are in the
4 Category 3 that you will represent.

5 So I'm curious as to the New Jersey Economic Development
6 Authority and the Office of the Governor, why they're in
7 Category 3 if New Jersey law requires the New Jersey
8 Attorney General to be the sole legal adviser to all agencies
9 in New Jersey.

10 **MS. WANG:** So the statutes that promulgated these
11 agencies, for some of them, the agencies are given expressly
12 the autonomy to either choose whether to retain the AG's Office
13 or to retain their own counsel. That's set out in these
14 statutes. And we didn't include the full list of statutes in
15 our one-pager, given the space.

16 But for the Economic Development Authority, it is
17 Title 34, Chapter 1B-4, which establishes the Economic
18 Development Authority underneath the Department of the
19 Treasury. And the Office of the Governor is also a
20 constitutionally created entity. And so those two, you know,
21 they just have the carve-out to have discretion to choose.

22 **THE COURT:** Okay. Have you been in contact with
23 either of those two agencies to determine whether they've
24 decided to rely on the Attorney General's Office for New Jersey
25 if they -- assuming however discovery goes forward in this

1 case?

2 **MS. WANG:** We have not contacted them about
3 representation.

4 **THE COURT:** Okay. Same question. The document
5 requests listed all the New Jersey agencies that are an issue
6 here?

7 **MS. WANG:** So in Meta's first set of RFPs, they listed
8 not only the eight or nine agencies that were originally
9 provided, but they also listed the legislature. And then
10 I think -- I believe in the second set of RFPs, they removed
11 the legislature.

12 **THE COURT:** Okay. And even as a courtesy, you didn't
13 think to contact these other agencies?

14 **MS. WANG:** While it is true that we are able to
15 facilitate discovery as a courtesy, I would defer to the
16 co-leads, but I believe we offered that and I think that that
17 process was not -- was not chosen for whatever reason. I mean,
18 we did offer to facilitate.

19 **THE COURT:** Okay. But that's not really -- who did
20 you offer that to? The agencies?

21 **MS. WANG:** To Meta.

22 **THE COURT:** Okay. That wasn't my question.

23 Your office, even as a courtesy, didn't reach out to any
24 of these agencies to even alert them as to this discovery
25 dispute?

1 **MS. WANG:** No, because for New Jersey, it is very
2 clear that the Division of Consumer Affairs is the only
3 appropriate party for first-party discovery.

4 **THE COURT:** So, similar question, then. If you
5 prevail today, then these agencies are relieved from Rule 34
6 discovery in this case; right?

7 **MS. WANG:** Yes.

8 **THE COURT:** So the arguments and positions you're
9 advancing advance the interests of these agencies; correct?

10 **MS. WANG:** Not necessarily.

11 **THE COURT:** Okay.

12 **MS. WANG:** The only party that we're -- or the only
13 agency that we're advancing is the Division of Consumer
14 Affairs.

15 **THE COURT:** Okay. But the agencies -- the New Jersey
16 agencies stand to benefit from the arguments you're making
17 today; no?

18 **MS. WANG:** They could, but that's a theoretical
19 possibility. And none of the agencies have expressed any
20 position on this.

21 **THE COURT:** Well, Rule 34 discovery is treated
22 somewhat differently from Rule 45 discovery, isn't it?

23 **MS. WANG:** Yes. Correct.

24 **THE COURT:** It's one of the reasons you're fighting
25 over this issue, isn't it?

1 **MS. WANG:** Yes.

2 **THE COURT:** So the agencies, as a practical matter, do
3 stand to benefit from the arguments you're making today; no?

4 **MS. WANG:** Yes, Your Honor. But, again, we would
5 argue that it is, rather, the question of legal control as to
6 whether we're able to obtain those documents on demand.

7 **THE COURT:** Same question I had for Arizona. In
8 New Jersey, if there is monetary relief of some kind awarded to
9 the State of New Jersey at the end of all this, how does that
10 get allocated at the end of the day?

11 **MS. WANG:** I'm not 100 percent sure on the specifics,
12 but I believe it would go into a general fund but specifically
13 earmarked for consumer protection, which, again, would be the
14 Division of Consumer Affairs.

15 **THE COURT:** Well, similar to what was represented with
16 Arizona, is it possible the legislature or some other procedure
17 could allocate the funds differently from the general fund and
18 steer them to one of these agencies, for example?

19 **MS. WANG:** I don't have a lot of visibility into that
20 process, Your Honor. Sorry.

21 **THE COURT:** Okay. And are or were any of the listed
22 New Jersey agencies involved in investigating this action?

23 **MS. WANG:** No. Only the Division of Consumer Affairs,
24 Your Honor.

25 **THE COURT:** So for Meta -- you said the Division of

1 Consumer Affairs for New Jersey?

2 **MS. WANG:** Yes.

3 **THE COURT:** Is that part of the -- that's underneath
4 the AG's Office?

5 **MS. WANG:** Correct. It's organized under the
6 Department of Law and Public Safety.

7 **THE COURT:** And so is there any dispute that document
8 requests served to your client would encompass the Division of
9 Consumer Affairs for the State of New Jersey?

10 **MS. WANG:** That would be appropriate.

11 **THE COURT:** Same question I had with Arizona. Since
12 it's Meta's burden -- you haven't cited any -- is there any
13 information from any of these agencies that New Jersey has
14 injected into this case?

15 **MR. CARPENTER:** So, a few responses.

16 First is to what the Court's question is of if there's a
17 document or something that we're looking at, the answer is no,
18 but I think that's part of the reason we would be wanting
19 discovery. And I think that if there are issues of relevance
20 or if there are issues of, well, some agency is so tangentially
21 related that there's a proportionality issue, that's what can
22 be dealt with in the ordinary course of discovery.

23 And I think when you look at the cases analyzing this
24 issue, I don't believe any of them have -- cases like *Shelby*
25 and *Generic*, there was no showing there, necessarily -- for

1 example, in *Shelby* -- that the particular agency would have had
2 a document. Instead, the courts looked at the statutory
3 framework.

4 **THE COURT:** All right. Anything further on
5 New Jersey?

6 **MS. WANG:** No, Your Honor.

7 **MR. CARPENTER:** Just a few very brief points, if I
8 could once again, to respond to some of that.

9 I agree that the statute says that the AG is the sole
10 attorney, and the New Jersey Supreme Court, I think, has gone
11 even stronger and said that they exclusively control all
12 litigation. I think that that's stronger language than even
13 some of the cases we've cited have used and made positive
14 findings.

15 I also think that -- Your Honor asked this question both
16 of Arizona and of New Jersey. I do think it's true that they
17 are aligning their interests with the agencies right now in
18 this dispute because they're trying to shield them from
19 discovery they would otherwise be subject to.

20 And, finally, I just want to clean up one thing I said
21 earlier about the Third Circuit's right to control test. It is
22 true that some courts have employed a practical right to obtain
23 test. In the Third Circuit, as I understand it, the test is a
24 legal control one; and as I think I said earlier, in *Generic*,
25 that was the only question, was legal right to obtain.

1 **MS. WANG:** Your Honor, if I may.

2 **THE COURT:** Sure.

3 **MS. WANG:** Well, as we've provided in our one-pager,
4 our position is that control over litigation is not the same
5 thing as control over documents of agencies.

6 **THE COURT:** Okay. I understand the argument.
7 Anything further?

8 **MS. WANG:** No, Your Honor.

9 **MR. CARPENTER:** Nothing for Meta.

10 **THE COURT:** Okay. Since we're down two out of five,
11 why don't we take a short break so people can stretch their
12 legs.

13 **THE CLERK:** We're off the record right now.

14 (Recess taken at 2:43 p.m.)

15 (Proceedings resumed at 2:57 p.m.)

16 **THE CLERK:** Recalling 22-3047, In Re Social Media
17 Adolescent Addiction and Personal Injury Products Liability
18 Litigation.

19 **THE COURT:** Remind me who's next.

20 **MR. BURNS:** Good afternoon, Your Honor. Jonathan
21 Burns from the Pennsylvania Office of Attorney General.

22 **THE COURT:** Good afternoon.

23 Okay. So under Pennsylvania state law, Meta cites a
24 statute that says that the Attorney General shall represent all
25 agencies in litigation; correct?

1 **MR. BURNS:** That is dependent on certain factors. So
2 under the Commonwealth Attorneys Act, we are able to represent
3 these agencies, but it is a matter of efficiency.

4 So when an issue comes before us, a legal issue that needs
5 to be responded to, the Office of Attorney General would meet
6 with the -- with the agencies and then determine, based on what
7 the specific request is, who is in a better position to
8 represent themselves.

9 So it's the ability to represent if it would be in the
10 efficiency of that particular legal issue or representation.

11 **THE COURT:** Because the statute as quoted to me and as
12 I looked it up, 71 Pennsylvania Statute 732-204 doesn't appear
13 to have that efficiency carve-out that you're talking about.
14 It says fairly unequivocally that the Attorney General shall
15 represent all agencies.

16 **MR. BURNS:** I believe later in that piece of 204 is
17 where it says that it's based on determination of efficiency.
18 That is a block piece of the paragraph.

19 **THE COURT:** Okay.

20 **MR. BURNS:** And it's closer towards the end of the
21 paragraph.

22 **THE COURT:** Okay.

23 **MR. BURNS:** I can represent to you, there is no
24 requirement for the Office of Attorney General to represent our
25 agencies. As you know, they're independent agencies. They

1 have their own legal counsel. So it really comes down to the
2 efficiency of who is better suited to represent the agency.

3 **THE COURT:** Okay. Just to update this, so for the --
4 one, two, three, four, five -- six Pennsylvania agencies listed
5 in the chart that's Exhibit 1 to Docket 738, I think you put
6 them all in the Category 2 column. Is that still accurate, or
7 does that need to be updated?

8 **MR. BURNS:** That is still accurate, Your Honor.

9 **THE COURT:** Meta also cites and relies on a statute
10 that says that your office shall have the right to access at
11 all times the books and papers of any Commonwealth agency
12 necessary to carry out your office's duties under the Act.

13 That's separate and apart from whether there's litigation
14 pending. It would have covered that, but it's not limited to
15 litigation?

16 **MR. BURNS:** So that -- yes, Your Honor. That issue
17 was discussed in the *Generic Pharms* litigation. The
18 determination in that case -- and I can say that we disagree
19 with the holding of that case. But even under *Generic Pharms*,
20 the question there is the "shall" portion of the statute
21 relates to our investigation of those agencies. So we would
22 be -- where we investigate those agencies, then that would give
23 us access to those documents.

24 And in *Generic Pharms*, what was held was because it was --
25 that Pennsylvania necessarily put the issue of the agencies

1 being misled and that they relied on those misrepresentations,
2 that they then needed to respond as part of the discovery
3 process.

4 **THE COURT:** In *Generic Pharmaceuticals*, the court,
5 I think, rejected the argument that that statute Section 73208
6 should be limited only to investigations; correct?

7 **MR. BURNS:** What they -- what they said was it's --
8 it's correct that they said it was not limited to
9 investigations; but then they went on to say that "necessary,"
10 in that particular situation, was specifically because
11 Pennsylvania has put into the suit the relevance of the
12 documents from the agencies that paid for the generic drugs.

13 So as Meta had stated earlier in the argument today, that
14 is not an issue here. We have not put into this case the
15 relevance of these agencies. We're seeking a benefit on behalf
16 of the Pennsylvania consumers, not the agencies.

17 **THE COURT:** So same question I asked your colleagues.
18 Have any of the listed Pennsylvania agencies been involved in
19 any way in the investigation of this case?

20 **MR. BURNS:** No, sir.

21 **THE COURT:** And I guess for Meta, you would admit that
22 you haven't put in any evidence and you're not relying on any
23 evidence from these other agencies that the Pennsylvania
24 Attorney General has injected into this case; correct?

25 **MR. CARPENTER:** So it's certainly not in the

1 complaints. We don't yet have evidence from them because
2 discovery hasn't occurred. I mean, we take them at their word
3 for right now, but I think that that just underscores that
4 discovery is appropriate.

5 I also think that the question of whether a particular
6 document was put in -- I tried to explain before why that
7 wasn't relevant, and I think there's another point to make
8 there, which is that the agencies themselves may well have
9 relevant documents, given the subject matter of these cases.

10 So just to take a few examples, if an agency has documents
11 showing, for example, the effects or alleged effects of Meta's
12 platforms -- apologies, Your Honor. I'll slow down -- the
13 alleged effects of Meta's platforms on teens, then those would
14 potentially be relevant, and we'd like to conduct discovery
15 into them.

16 If, for example --

17 **THE COURT:** Well, but, I mean, what the Pennsylvania
18 AG and the other AGs are saying is you can take that discovery
19 by subpoena; you don't need to get it through Rule 34. I don't
20 think they're arguing you're not entitled to issue discovery to
21 the agencies. It's just the procedure by which you're trying
22 to get it.

23 **MR. CARPENTER:** Yes, Your Honor. And I think what
24 courts have recognized is that that's much more burdensome. As
25 the Court stated earlier, third-party and party discovery vary

1 in meaningful respects. And I think what courts have said --
2 for example, we cited a Texas District Court case, a Voting
3 Rights Act case in our papers. What that court explained is
4 that party discovery only flowing one way, especially in a case
5 like this, is just fundamentally inequitable. It's not the way
6 the rules are meant to work. It would be much more burdensome
7 for us to have to serve third-party discovery on all of them.

8 **THE COURT:** I think I said Rule 34 and 45 could vary.
9 I don't think I said meaningful respects. They do vary,
10 though.

11 All right. Same question I had for your colleagues. In
12 Pennsylvania, how would any monetary relief, if any, be
13 allocated at the end of all this?

14 **MR. BURNS:** In Pennsylvania, there is a generic civil
15 penalties fund. My understanding is that if the
16 Attorney General recovers sums of money, most of that money or
17 all of that money would be flagged to go back to the
18 Attorney General, but there's no prohibition of it going to
19 other parts of the Commonwealth.

20 **THE COURT:** Well, on behalf -- well, with respect
21 to -- not "on behalf." With respect to these Pennsylvania
22 agencies, are the arguments you're advancing in alignment with
23 their interests?

24 **MR. BURNS:** I -- I would say in relation to --
25 tangentially, they could be. We don't -- we don't a hundred

1 percent know.

2 To sort of preemptively answer one of your other
3 questions, we have not met with them. We do not know at this
4 point. Because of Pennsylvania's efficiency method, we take --
5 we decide to narrow the scope to the extent that it is possible
6 before we would have those interactions with the agencies; and
7 then once we have those interactions, we can decide who is
8 going to respond.

9 So I do not know how or if it would benefit them. We
10 haven't had those conversations.

11 I can say that we are representing our own interests here
12 in the sense that if we were forced to respond on their
13 behalf -- and we do not have control of these documents under
14 *Citric Acid* -- we would now then be placed in a situation where
15 we cannot produce the documents and theoretically could be
16 subject to some type of sanction because the agency is
17 unwilling to produce the documents and we have no ability to
18 force them to produce those documents. So that's an interest
19 of our own.

20 **THE COURT:** I don't understand your hypothetical. You
21 say "if we were forced to respond on their behalf and we do not
22 have control under *Citric Acid*." But how would you be forced
23 to respond on their behalf if you don't have control? In other
24 words, the only time you would be required to respond to the
25 document request, not a subpoena, on behalf of the agencies is

1 if the Court found you had control; no?

2 **MR. BURNS:** That is accurate, Your Honor. And to that
3 I would say we do not have control of the documents.

4 **THE COURT:** I understand that's your argument. That's
5 what I'm here to decide.

6 **MR. BURNS:** Right. Right.

7 **THE COURT:** Okay. Well, you talked about what if
8 they -- what if the agencies were to refuse to work with you to
9 get the documents. I mean, clients can fight with their
10 lawyers on whether or not to produce the documents or not; but
11 the lawyers -- ultimately, you, as counsel in this case -- have
12 an obligation under the Federal Rules of Civil Procedure to do
13 what you can to do a reasonable search and produce documents in
14 discovery, kind of in the generic federal case.

15 **MR. BURNS:** And that would be true if they were our
16 clients, but at this point, they are not.

17 **THE COURT:** I guess my point is, if the Court were to
18 find that there is control, your concern that somehow the
19 agencies would refuse to work with you on the document
20 collection and production process, there are procedures in
21 federal court for, you know, obstreperous clients; right?

22 **MR. BURNS:** I'm saying it's their legal right to -- to
23 not have us represent them; and so, therefore, they would not
24 be our client. And then we would have --

25 **THE COURT:** That wasn't my hypothetical. If I were to

1 find there were control -- right? -- your concern in that
2 instance would be that somehow they would refuse to work with
3 you, even if I found control. In other words, if I don't find
4 control, then you don't have to go and talk to them directly;
5 right? The only time you have to go try to get the documents
6 in response to the document request is if I find control;
7 right?

8 **MR. BURNS:** I believe that's correct, yes.

9 **THE COURT:** Right. I mean, putting aside whether in
10 the future Meta serves a subpoena, for purposes of the Rule 34
11 document requests, the only time you need to go talk to the
12 agencies to try to collect documents is if I ultimately rule,
13 hypothetically, that you had control; right?

14 **MR. BURNS:** Correct.

15 **THE COURT:** Okay. And then you had raised the concern
16 that they may -- in that case, the agencies in that
17 hypothetical, over whom I found you have control, would somehow
18 refuse to give you the documents. But there are procedures in
19 this court for dealing with clients who are obstreperous about
20 discovery; right?

21 **MR. BURNS:** I would say -- and we might be going in
22 circles here. But if you found that we had control, that
23 infers that they are our client.

24 And if they then said, "We are not your client; we have
25 the ability to not be your client," now we are stuck in this

1 catch-22 where we have an order from you saying that we have
2 control under *Citric Acid* because they are our client but they
3 have the ability to say that they are not.

4 **THE COURT:** I don't think -- I don't need to make a
5 finding that they're your client for purposes of *Citric Acid*,
6 do I? I mean, *Citric Acid* just -- I mean, that may be one of
7 the -- that may be a factor; right? It may lead to that. But
8 the factors to finding control are -- there's many factors;
9 right? It isn't -- I don't -- I suppose, does it flow directly
10 if they are a client?

11 **MR. BURNS:** Could you say that again?

12 **THE COURT:** Does the issue of control, is it
13 determined definitively if they are your client? Let's assume
14 there's a case, hypothetically, where an agency says, "Yes, we
15 are your client." Is there then control?

16 **MR. BURNS:** I do not know the answer to that.

17 **THE COURT:** Okay. Well, again, I think I asked one of
18 your colleagues this question. Assuming they were your client,
19 you'd have an obligation under the federal rules to go get the
20 documents from your client; right?

21 **MR. BURNS:** Correct.

22 **THE COURT:** So that's a legal right to -- it's a legal
23 basis on which to get the documents from your client; right?

24 **MR. BURNS:** Sure. Yes.

25 **THE COURT:** And it's not unheard of in the annals

1 of federal litigation that sometimes clients don't want to be
2 forthcoming with their documents, even with their own
3 attorneys; right?

4 **MR. BURNS:** I believe that happens in situations.

5 **THE COURT:** Right, unfortunately. And the courts are
6 not powerless to enforce and work with counsel and try to
7 figure out ways to resolve the issue to get the clients to
8 start complying with their discovery obligations; right?

9 **MR. BURNS:** I believe that's true.

10 **THE COURT:** Okay. So while I understand the concern
11 that you may end up in some hypothetical potential situation
12 where an agency in Pennsylvania may not be all that
13 cooperative, you're not without recourse, I guess is my
14 question, I mean; right? That's an eventuality which
15 (a) hasn't happened; but (b) there are ways to address it.
16 Right?

17 **MR. BURNS:** I think this is the problem with
18 hypotheticals because it's very hard for me to know the
19 parameters of whether or not we would be able to respond or
20 what the Court would be --

21 **THE COURT:** You're the one who raised --

22 **MR. BURNS:** -- able to do.

23 **THE COURT:** -- the hypothetical. You raised the
24 hypothetical --

25 **MR. BURNS:** I was the one that raised it.

1 **THE COURT:** -- problem that they may not comply.

2 **MR. BURNS:** And I immediately regretted it,

3 Your Honor.

4 **THE COURT:** Okay. All right. I did look at the
5 document requests that were e-mailed to the Court, and they do
6 list the agencies and the definition of who should be
7 responding to the document requests, the "You." And I take
8 your representation you haven't communicated even the fact that
9 those document requests exist to the agencies.

10 Under your view of, I guess, really, the law of ethics and
11 professional responsibility, as soon as those document requests
12 named those agencies as part of the universe of people who
13 should be responding to the document requests, did that trigger
14 your obligation to at least notify them and start advising them
15 as counsel?

16 **MR. BURNS:** I don't believe so, not -- I don't believe
17 there would be an ethical obligation there, Your Honor.

18 Again, we are working to narrow the scope of these
19 discovery requests --

20 **THE COURT:** Right.

21 **MR. BURNS:** -- in the process.

22 There is the efficiency element in Pennsylvania. So we
23 would notify them at the point where we believe that there was
24 an obligation for them to be responding.

25 And at this point, they're not parties to the litigation,

1 and we don't believe that they should be respond- -- or that
2 they are required to be responding to these -- to these
3 discovery requests.

4 **THE COURT:** Well, maybe not responding directly,
5 but -- okay. So let's flip the hypothetical. And I know you
6 want to avoid hypotheticals, but bear with me on this one.

7 Let's say Pennsylvania served a document request on Meta
8 and, in that document request, defined "You" to include not
9 just Meta here but, let's say Meta -- Meta's corporate
10 subsidiary in Australia. Right? You would be fine if Meta's
11 counsel never contacted Meta Australia and at least alerted
12 them to the fact that they were potentially at issue in this
13 dispute, especially if a motion to compel were filed?

14 **MR. BURNS:** At -- well, I would say at the point where
15 a motion to compel would be filed, we would be beyond the stage
16 that we are currently at right now in this litigation. Once we
17 know the scope of the discovery, we certainly will contact
18 those agencies and make sure that they know what the
19 obligations are, based on this Court's order.

20 **THE COURT:** Okay. Check my notes.

21 (Pause in proceedings.)

22 **THE COURT:** All right. Response from Meta.

23 **MR. CARPENTER:** Thank you, Your Honor.

24 First point is, on the issue of the state having an
25 obligation to represent agencies, the statute does say "shall."

1 The subsection that counsel is referring to does not say that
2 the two get together and mutually decide, and it certainly
3 doesn't give discretion to the agency. What it says, by its
4 plain text, is that the Attorney General can decide that
5 someone else can represent the agency.

6 The second thing is, on the special statute that
7 Pennsylvania has about access to documents by the AG, I believe
8 the Court was correct that *Generic* rejected the view that it
9 was about investigations only. There's certainly nothing in
10 the text that cabins it only to investigations. All it says,
11 what *Generic* said and what the case *Generic* cited from the
12 Pennsylvania Supreme Court said was that any time it's
13 necessary to comply with their obligations under the organic
14 statute.

15 I think it is -- and I think with that, we're good for me.

16 **THE COURT:** Okay. Anything further?

17 **MR. BURNS:** My response to the efficiency retort from
18 Meta's counsel is that, yes, the statute does say that,
19 ultimately, we do have that decision to make; but we would do
20 that based on the facts that were in front of us at that
21 particular time in conjunction with the agency. That's the
22 practice in Pennsylvania. It's not a unilateral decision.

23 **THE COURT:** All right. Just so I'm clear, that
24 process by which the Attorney General reaches that decision,
25 that's not expressly in the statute. That's just how the

1 Attorney General implements the statute. Is that correct?

2 **MR. BURNS:** Correct, Your Honor.

3 **THE COURT:** Okay. Anything further for Pennsylvania?

4 **MR. BURNS:** Nothing further.

5 **THE COURT:** Submitted as to Pennsylvania.

6 Is Connecticut next?

7 **MS. LAUNER:** Good afternoon, Your Honor. Krislyn
8 Launer, Assistant Attorney General from the State of
9 Connecticut.

10 **THE COURT:** Good afternoon.

11 All right. As I've been doing, I start with the chart.

12 So Meta cites law from Connecticut that the Connecticut
13 Attorney General exclusively provides legal services for
14 Connecticut agencies. Is that correct, in your view?

15 **MS. LAUNER:** No, Your Honor. I believe Meta
16 mischaracterizes our Attorney General's authority statute.

17 **THE COURT:** Okay.

18 **MS. LAUNER:** The statute does say that the
19 Attorney General shall represent agencies as his duties -- as
20 the duties of his office require, and he does have supervision
21 over civil lawsuits, but whether or not that's representation
22 by the Attorney General's Office or somebody else is to be
23 determined. The Attorney General does have the authority to
24 allow state agencies to hire outside counsel.

25 **THE COURT:** So Connecticut Statute 3, dash -- is it 25

1 or 125?

2 **MS. LAUNER:** 125.

3 **THE COURT:** -- 125, the language there says
4 the Attorney General shall appear for the Governor and boards,
5 et cetera, in all actions.

6 So where is the -- is there a part of that statute I'm
7 missing?

8 **MS. LAUNER:** The end of that sentence does say "as the
9 duties of his office require."

10 **THE COURT:** Okay. So, okay. Going back to the chart,
11 then, all but one of the Connecticut agencies are in what you
12 used as Category 2. Is that still accurate?

13 **MS. LAUNER:** Yes, Your Honor.

14 **THE COURT:** Okay. And for the moment, put aside the
15 Connecticut Department of Consumer Protection. Well, let me
16 just close the loop on that.

17 So is there any dispute that the document requests served
18 to date would apply not just to the Attorney General's Office
19 but also to the Department of Consumer Protection?

20 **MS. LAUNER:** Yes, Your Honor, there is a dispute.

21 **THE COURT:** Okay.

22 **MS. LAUNER:** We do not have control over the agency's
23 records. We do not have the ability to access them or produce
24 them. Admittedly, the Department of Consumer Protection does
25 have a unique relationship with the Attorney General's Office

1 under Connecticut General Statutes 42-110m, simply in that the
2 Department of Consumer Protection Commissioner authorizes the
3 state to bring suits for violation of the Connecticut Unfair
4 Trade Practices Act. However, we do not consider them to be a
5 client, nor are they a named party to those particular cases.
6 They are not involved in any way other than reviewing
7 complaints and giving their authorization.

8 **THE COURT:** So has the Connecticut Department of
9 Consumer Protection been involved in the investigation or
10 prosecution of this matter?

11 **MS. LAUNER:** No, Your Honor.

12 **THE COURT:** Their only involvement was reviewing the
13 draft complaint?

14 **MS. LAUNER:** Correct.

15 **THE COURT:** Well, what does that entail? What does
16 "reviewing the draft complaint" mean? That could be a
17 monthslong process or it could be a one-day process.

18 **MS. LAUNER:** That is correct, Your Honor, it could be
19 either way. The Department of Consumer Protection gets a copy
20 of the complaint. They review it. They determine whether or
21 not they feel that the Connecticut Unfair Trade Practices Act
22 has been violated. If they deem that it has been violated,
23 they give us the authority to file suit.

24 **THE COURT:** In this case, how long did that process
25 take?

1 **MS. LAUNER:** To the best of my knowledge, it was less
2 than a week.

3 **THE COURT:** Other than the transmission of the draft
4 complaint one way and the authorization the other, were there
5 any other communications between anyone in your office and the
6 Department of Consumer Protection about this case?

7 **MS. LAUNER:** We had let them know the status of the
8 case simply as a courtesy. The Attorney General's Office has
9 sole decision-making in this litigation. So it simply is a
10 courtesy, we've let them know what's going on.

11 **THE COURT:** And even in the prefiling stage, there
12 were no communications other than the transmission of the draft
13 complaint one way and the authorization the other way?

14 **MS. LAUNER:** To the best of my knowledge. I cannot
15 say with certainty, but to the best of my knowledge, the
16 complaint was their first interaction.

17 **THE COURT:** Well, that's first. But my question is:
18 Was there a dialogue between your office and the Department of
19 Consumer Protection?

20 **MS. LAUNER:** I do not know. I know that they were not
21 involved in the investigation, but as far as a dialogue, I do
22 not know.

23 **THE COURT:** Okay. And just so the record's clear,
24 were any of the other listed Connecticut agencies involved in
25 any way in the investigation of this matter?

1 **MS. LAUNER:** No, none whatsoever.

2 **THE COURT:** And same question I asked your colleagues.
3 Have you contacted any of the listed Connecticut agencies
4 concerning this current discovery dispute?

5 **MS. LAUNER:** No, Your Honor.

6 **THE COURT:** Okay. And under Connecticut law, how are
7 damages allocated if any are awarded or any monetary relief is
8 awarded at the end of all this?

9 **MS. LAUNER:** As Your Honor is aware, at this point in
10 time, we are not seeking -- or flat-out, we are not seeking
11 damages. However, if damages were awarded, it would be a
12 question for the legislature but, more likely than not, would
13 go into a general fund.

14 **THE COURT:** And how do you handle the ruling in
15 *Generic Pharmaceuticals* for Connecticut?

16 **MS. LAUNER:** First of all, Your Honor, we do not
17 believe that the court in *Generics* said that the
18 Attorney General's Office has control over documents of state
19 agencies. The Court did say that the Attorney General has
20 broad authority. However, the Court cited to Connecticut
21 General Statute 3125 which lays out, as we discussed, the
22 Attorney General's duties as they relate to legal matters and
23 his attorney-client relationship with state agencies. The
24 statute is only relative to legal representation and not the
25 daily affairs or records.

1 The Court also cited to *Connecticut Commission on Special*
2 *Revenue vs. Connecticut Freedom of Information Commission*. The
3 quote cited, when read in a vacuum, may lead one to think that
4 the Attorney General has control over state agencies. However,
5 when read as a whole, as it should be, you understand that this
6 case, just like the statute, is referring to the
7 Attorney General's attorney-client relationship with state
8 agencies. The Attorney General does not have broad authority
9 over state agencies but, rather, broad authority over legal
10 matters involving the state.

11 Additionally, in *Generics*, opposing counsel was seeking
12 relevant information. The state agencies listed by Meta that
13 are in Connecticut cannot, arguably, be related -- said to have
14 related information to this case.

15 **THE COURT:** What part of the *Citric Acid* test is
16 determined by relevancy?

17 **MS. LAUNER:** Your Honor, I was referring to
18 the Court's holding in *Generics*.

19 **THE COURT:** Yeah.

20 **MS. LAUNER:** The Court found that the agencies that
21 opposing counsel was seeking documents from were relevant in
22 that case.

23 **THE COURT:** I've got the opinion in front of me. I
24 don't see where -- in the Connecticut section, where there's a
25 finding that control is dependent on the relevancy of the

1 documents sought.

2 **MS. LAUNER:** Your Honor, I believe it's in the broad
3 holding, not in the Connecticut-specific section.

4 **THE COURT:** Okay. Well, under *Citric Acid*, is
5 relevancy a factor?

6 **MS. LAUNER:** No.

7 **THE COURT:** Is lack of relevancy a factor?

8 **MS. LAUNER:** No.

9 **THE COURT:** Under Connecticut rules of professional
10 responsibility, the document requests listed the Connecticut
11 agencies as targets of the document requests.

12 Once your office received those requests, as a matter of
13 the law of ethics in Connecticut, were you then obligated to
14 inform the agencies that they were at least potentially part of
15 this dispute?

16 **MS. LAUNER:** At this point in time, no, Your Honor, I
17 don't think that we are required to let them know, nor do
18 I think it would be efficient or appropriate for us to let them
19 know. I don't think running into their offices, claiming fire,
20 when it's something that we're trying to prevent in the first
21 place, would be an effective use of anybody's time.

22 We are trying to prevent a court's ruling that we have
23 control because we simply don't. And to have them focus their
24 time and worry about an issue that may not even be an issue
25 just simply wouldn't be efficient.

1 **THE COURT:** I didn't really ask about whether you were
2 going to run in and yell "fire." But putting that aside, you,
3 among others of your colleagues, make the virtual veto
4 argument --

5 **MS. LAUNER:** Yes.

6 **THE COURT:** -- which I actually don't entirely
7 understand because we're only talking about discovery here, not
8 merits -- prosecution of the merits of the case.

9 How does a finding of control for discovery give any
10 agency a virtual veto over the case?

11 **MS. LAUNER:** Finding that the Attorney General's
12 Office has control over these state agencies would essentially
13 override the power of the Governor. The Governor controls
14 state agencies. He appoints the commissioners of state
15 agencies. Those commissioners answer to him. They do not
16 answer to the Attorney General, nor do we have any control over
17 who's in those positions or those agencies. That power rests
18 with the Governor.

19 **THE COURT:** Well, but that's really independent agency
20 argument. Focusing on the "virtual veto" --

21 **MS. LAUNER:** Correct.

22 **THE COURT:** -- phrase that you've used, again, how
23 does -- maybe I'm just not following -- how does a virtual veto
24 flow from a discovery finding that there's control for purposes
25 of Rule 34?

1 **MS. LAUNER:** If we have control over them, that would
2 take control away from the Governor.

3 **THE COURT:** Does *Citric Acid* require me to find that
4 the Attorney General's Office has operational control over the
5 other agencies?

6 **MS. LAUNER:** Control or the right to demand documents,
7 the legal right to demand documents --

8 **THE COURT:** Okay.

9 **MS. LAUNER:** -- which we don't.

10 **THE COURT:** Well, I know that's your position. But,
11 in other words, saying that your office would be taking away
12 control of these agencies from the Governor just because you
13 can get documents from them, I don't understand how that's a
14 virtual veto.

15 **MS. LAUNER:** It implies that we have control at all
16 over the agency.

17 **THE COURT:** You have control over the documents, not
18 the agency.

19 **MS. LAUNER:** To access the agency's records would be
20 control over the agency.

21 **THE COURT:** Does that mean every time an outside
22 lawyer accesses documents from a client, they have control --
23 they, operationally, control the client and somehow take away
24 control of that client from its board of directors?

25 **MS. LAUNER:** Well, they have a legal right to demand

1 those documents if they're representing them in a party
2 capacity.

3 **THE COURT:** Right. And so the only reason I would be
4 finding that you have an obligation to go get the documents is
5 if I found control; right?

6 But you're arguing that that would give them a virtual
7 veto and take power away from the Governor. I don't see how
8 that flows, because what you're essentially arguing is that
9 every time an outside lawyer goes into a client, it somehow
10 divests the board of directors and the CEO of control of the
11 company. That doesn't seem to follow.

12 **MS. LAUNER:** I don't believe that's what I'm arguing.
13 I'm saying the Attorney General's Office doesn't have control
14 over those agencies, which is everything about the agency.

15 **THE COURT:** Okay. I just -- what is the veto over?
16 What is the virtual veto over? I don't understand what the
17 phrase "virtual veto" is referring to then. What is being
18 vetoed?

19 **MS. LAUNER:** The Governor's power.

20 **THE COURT:** That's not the way you phrased it in the
21 briefing, but okay.

22 Okay. So your view is that the virtual veto is not over
23 your office's independent responsibility to the state. It's a
24 virtual veto over the Governor's ability to control other
25 agencies?

1 **MS. LAUNER:** Well, our office's independent
2 responsibility to the state, as well as being independent from
3 the Governor, yes, we're independent from the agency.

4 **THE COURT:** I don't see -- what is being vetoed?

5 **MS. LAUNER:** The Governor's authority.

6 **THE COURT:** Does the Governor have the authority to
7 order an agency to refuse compliance with a federal court order
8 to find documents?

9 **MS. LAUNER:** No, Your Honor.

10 **THE COURT:** What we're talking about here is
11 discovery -- right? -- not operations of the agencies.

12 **MS. LAUNER:** Right.

13 **THE COURT:** What is it that the Governor is unable to
14 do with the agencies simply because hypothetically I were to
15 find control and access? I just don't understand what's being
16 vetoed. I could see if you took the position the Governor has
17 the power and the authority to defy court orders and refuse and
18 order agencies not to produce documents, but I don't hear --
19 you're not arguing that.

20 So what's being vetoed?

21 **MS. LAUNER:** It's an issue with the separation of
22 powers, the fact that the Governor is an independently elected
23 official, the Attorney General is an independently elected
24 official. They have different responsibilities. The
25 Attorney General's responsibilities are independent from that

1 of the Governor. And the agencies answer to the Governor.

2 **THE COURT:** But if you were right, then every time
3 there's any kind of independent agency, there could never be
4 control then, even in the most egregious facts.

5 **MS. LAUNER:** Your Honor, if they are a party to a
6 case, then, yes, the Attorney General --

7 **THE COURT:** We don't get to the control issue if
8 they're a party; right? The control only goes to when you're
9 trying to get discovery from non-parties; right?

10 So hypothetically, assume the most egregious facts where
11 there is absolutely control. Under your theory, because --
12 your argument, because these are independent agencies and the
13 Governor has independent authority to govern them, even with
14 control, that there's a veto of the Governor's power?

15 **MS. LAUNER:** I don't see how the Attorney General has
16 control over those agencies in that circumstance.

17 **THE COURT:** Again, I don't think I need to find that
18 they have control over the agencies. They have control -- a
19 right to access the documents.

20 **MS. LAUNER:** Correct. Correct. I apologize. I'm
21 using those phrases synonymously.

22 **THE COURT:** But I don't think they're synonymous.
23 Right? In other words, the way you're phrasing it implies that
24 *Citric Acid* requires me to find that your office, the Attorney
25 General's Office has some kind of operational or legal control

1 over the agency as a whole. That's not the test; right?

2 **MS. LAUNER:** That is not the test, no. But the
3 documents are the agency's documents that we do not have a
4 legal right to access.

5 **THE COURT:** We talked about the statute and the
6 Attorney General's representation of agencies. Meta cites
7 the -- I'm going to mispronounce it -- the *Bysiewicz* case from
8 Connecticut, which at least the quote says: The authority to
9 perform legal services on behalf of agencies is conferred
10 exclusively on the Attorney General.

11 How does that square with your argument about what the
12 statute allows?

13 **MS. LAUNER:** Your Honor, I do apologize. I'm not
14 familiar with that case as a whole.

15 As with the other cases cited by Meta, they are, again,
16 cited in a vacuum such that the Attorney General does have
17 authority over the legal affairs, but that does not require the
18 Attorney General to act as the attorney in any given situation.
19 The Attorney General can authorize outside counsel.

20 **THE COURT:** Okay. Meta's response?

21 **MR. CARPENTER:** Thank you, Your Honor.

22 I'll start with the virtual veto concern. I had also
23 understood it differently in all of the states' briefing,
24 including when states in other cases have raised it. The
25 virtual veto concern, as we had understood it, is the idea that

1 because a state agency can refuse discovery, it can somehow
2 veto the case.

3 I agree with Your Honor's inclination that it doesn't make
4 much sense, to begin with. And we've cited cases calling it,
5 quote, speculative, conclusory, and unpersuasive.

6 This new argument about vetoing some aspect of the
7 Governor's power I also don't think holds water for the reasons
8 Your Honor said but, also, for the additional one that if we're
9 talking simply about production of documents in litigation,
10 that is, as we've been discussing, a core power of the
11 Attorney General, and it doesn't diminish the Governor's
12 authority at all.

13 Second, to move to the statutory framework and the
14 language of the cases we've been talking about, we think we
15 correctly characterize it. The statute says that it's
16 exclusive. The *Bysiewicz*, I believe, case that Your Honor
17 cited says that the authority is conferred exclusively on the
18 Attorney General. And I believe I even heard counsel say that
19 they have authority over, quote, legal affairs for the state.

20 On the issue of the Consumer Protection Department, while
21 we think that all of the agencies at issue there's a fairly
22 clear case that there's control, that one stands out in
23 particular based on the fact that they authorized it and also
24 based on the fact that in the Attorney General's briefing
25 before Your Honor today, they said that they're asserting the

1 attorney-client privilege. To now claim that there is no
2 attorney-client relationship I think would not be equitable.

3 On counsel's comments on *Generic, Generic*, as I read it,
4 is quite clear. It is a finding of control. It is a finding
5 of a legal right to obtain. That is the only test it is
6 employing. And in the part analyzing Connecticut, it looks
7 purely to the statutory and case law framework and finds that
8 there is a legal right to obtain based just on that, without
9 qualification.

10 On the issue of relevance, we agree that this isn't -- the
11 relevance of the possible request is not before Your Honor
12 today. That, again, can be litigated during ordinary
13 discovery, as we are doing right now with their RFPs against
14 us.

15 I believe that I heard counsel reference the concern that
16 a few states have raised that each agency controls its own
17 records. Just to be clear, *Generic* rejected that argument too
18 and held that just because an agency has responsibility for its
19 own records, maintaining them, keeping them in its files,
20 doesn't mean that there isn't a right to access under the
21 statutory framework.

22 And finally, I was also going to clarify what Your Honor
23 raised, which is that there doesn't need to be operational
24 control over the entire agency. We've never argued that, and
25 none of the cases require it.

1 **THE COURT:** As with the other states we talked about,
2 in fact, just to close the loop, is it correct that with regard
3 to all the states here, you haven't -- Meta is not relying on
4 evidence that the AG's office has injected from these agencies
5 into this case?

6 **MR. CARPENTER:** Correct. We don't know of any
7 evidence they've injected because all we have are their
8 complaints and what they've chosen to reveal.

9 **THE COURT:** If the Connecticut Department of -- let me
10 get it right -- Consumer Protection authorized the suit and
11 you've been keeping them informed about the case, at least as a
12 courtesy, why didn't they show up here to advance their own
13 interests?

14 **MS. LAUNER:** Because they are not a party to this
15 case, Your Honor.

16 **THE COURT:** Third parties show up to oppose discovery
17 all the time.

18 **MS. LAUNER:** They have not been served with a
19 subpoena. They would be here if this was a Rule 45 issue. It
20 is not at this time.

21 **THE COURT:** Well, I assume you've told them that Meta
22 is taking the position that the Rule 34 document request
23 reached them.

24 **MS. LAUNER:** I do not know how much they know about
25 discovery at this point, Your Honor.

1 **THE COURT:** All right. Anything further from the
2 state?

3 **MS. LAUNER:** Just quickly in response.

4 Because case law cited by Meta says that the
5 Attorney General has authority over legal affairs does not
6 require the Attorney General to represent these agencies in any
7 given situation.

8 Additionally, because we may assert attorney -- or would
9 assert attorney-client privilege over communications with the
10 Department of Consumer Protection, again, does not make them a
11 party to this case. A client and a party are not necessarily
12 the same thing. Someone can be your client or an agency can be
13 your client and still not a party subject to Rule 34 discovery.

14 And finally, there is no statute in Connecticut giving the
15 Attorney General control over records of any of these agencies.

16 **THE COURT:** Just so I'm clear, you said "would
17 assert." You are, in fact -- in the brief, you are asserting
18 privilege as between your office and the Department of Consumer
19 Protection; correct? You don't say "would"; you say "are."

20 **MS. LAUNER:** If they were served with a subpoena, we
21 would.

22 **THE COURT:** Documents are privileged -- communications
23 are privileged, regardless of whether there's a subpoena served
24 or not. They either are or are not privileged. What's your
25 view? Are they or are they not privileged?

1 **MS. LAUNER:** Then correct, yes, we are asserting
2 attorney-client privilege. But, again, just because they're
3 our client does not make them a party.

4 **THE COURT:** Again, I'm not deciding whether they're a
5 party to the case.

6 **MS. LAUNER:** I know.

7 **THE COURT:** I know we're using that as shorthand. But
8 I just want to make clear, I'm not deciding whether they're a
9 party. I'm deciding whether there's control under *Citric Acid*,
10 which doesn't require a finding or joining anybody as a party
11 for purposes of the case as a whole.

12 Okay. Anything further?

13 **MS. LAUNER:** No, Your Honor.

14 **THE COURT:** Anything further from Meta?

15 **MR. CARPENTER:** Very quickly, if I can, Your Honor.

16 **THE COURT:** Sure.

17 **MR. CARPENTER:** First, I agree they do unequivocally
18 say that those communications would be privileged, subject to
19 the attorney-client privilege.

20 And, second, as the case law we cited in our brief shows,
21 if they are, in fact, a client, they should be -- they should
22 be subject to party discovery, recognizing you're not deciding
23 if they're a party based on that admission alone.

24 **THE COURT:** Okay. Anything further?

25 **MS. LAUNER:** Your Honor, attorney-client privilege is

1 based upon the relationship between the attorney and the
2 client, not the client and litigation. Simply because somebody
3 is our client does not -- and we could assert attorney-client
4 privilege does not mean that they must respond to discovery in
5 these circumstances.

6 **THE COURT:** Okay. By asserting attorney-client
7 privilege with respect to the Department of Consumer
8 Protection, you are taking the position that they are a client;
9 right?

10 **MS. LAUNER:** They are a client, yes.

11 **THE COURT:** Okay. And not just generically a client.
12 They are a client for purposes of this litigation; correct?

13 **MS. LAUNER:** Potentially.

14 **THE COURT:** Well, you're advancing their interests, in
15 fact, all the agencies' interests, but you're advancing
16 specifically their interests by resisting this argument about
17 control, aren't you?

18 **MS. LAUNER:** We are advancing the interests of the
19 People of the State of Connecticut.

20 **THE COURT:** Okay. But you can also -- you don't have
21 to -- it's not an exclusive. You can be advancing the
22 interests of the People of the State of Connecticut and, at the
23 same time, be advancing the interests of the Department of
24 Consumer Protection.

25 **MS. LAUNER:** If they tangentially are advanced, then,

1 yes, possibly, but that is not the intent.

2 **THE COURT:** All right. Anything further on
3 Connecticut?

4 **MS. LAUNER:** No. Thank you.

5 **MR. CARPENTER:** I think this one's been adequately
6 addressed, Your Honor. Thank you.

7 **THE COURT:** Submit on Connecticut.
8 Last one, California.

9 **MR. OLSZEWSKI-JUBELIRER:** Good afternoon, Your Honor.
10 Josh Olszewski-Jubelirer for the People of the State of
11 California.

12 **THE COURT:** Good afternoon.

13 Okay. So let's start where we've been starting on all the
14 others. Let's start with the chart.

15 So all the California entities in the chart, which is
16 Exhibit 1 to Docket 738, they're all at least listed in
17 Category 2. Is that still accurate?

18 **MR. OLSZEWSKI-JUBELIRER:** Yes, Your Honor.

19 **THE COURT:** And Meta cites California statute,
20 the Government Code Section 11040 that states, according to
21 them, that California agencies must consent -- must get the
22 consent of the Attorney General if they want to hire or retain
23 either their in-house counsel or outside counsel for
24 litigation. Do you agree with that?

25 **MR. OLSZEWSKI-JUBELIRER:** So let me walk the Court

1 through how that --

2 **THE COURT:** Answer my question first. Do you agree
3 that that's the law in California?

4 **MR. OLSZEWSKI-JUBELIRER:** I agree that 11040 is one of
5 the statutes that governs this situation. And specifically,
6 there are some agencies that -- let me take a quick step back.

7 All agencies have the ability to use in-house counsel or
8 hire outside counsel to represent themselves. For some
9 agencies, they need to obtain the consent of the
10 Attorney General in order to represent themselves using
11 in-house counsel or private outside counsel for the purpose of
12 litigation. Some agencies do not need the Attorney General's
13 consent.

14 **THE COURT:** For the agencies listed by Meta, are they
15 all in the consent bucket?

16 **MR. OLSZEWSKI-JUBELIRER:** No, Your Honor.

17 **THE COURT:** Which ones do not need the
18 Attorney General's consent to hire other counsel?

19 **MR. OLSZEWSKI-JUBELIRER:** The Department of Education
20 does not need the Attorney General's consent, and that's
21 Government Code 11041.

22 **THE COURT:** Okay. Any other California agencies that
23 do not need the Attorney General's consent to hire -- use
24 in-house counsel or hire outside counsel?

25 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, not under, to my

1 knowledge, under this statutory scheme.

2 I will say -- I'm happy to continue on, on this path. But
3 I will say, whether or not the Attorney General would represent
4 an agency in responding to a subpoena is really not
5 determinative of control under *Citric Acid*. Attorneys do not
6 have legal control over all of their client's documents. They
7 do not have the ability to obtain their client's documents on
8 demand. And they certainly do not have the ability to obtain a
9 client's documents on demand in order to respond to discovery
10 in a litigation where the client is not a party.

11 None of these agencies are parties to this litigation the
12 People brought -- the California Attorney General brought on
13 behalf of the People of the State of California. *Lockyer* is
14 very clear on this point. And whether or not other lawyers --

15 **THE COURT:** Let me stop.

16 Okay. You said attorneys do not have the ability to
17 obtain their client's documents on demand in order to respond
18 to discovery in litigation?

19 **MR. OLSZEWSKI-JUBELIRER:** That's right, Your Honor.

20 **THE COURT:** What's your understanding of your
21 obligation as counsel under Federal Rule of Civil Procedure 34?

22 **MR. OLSZEWSKI-JUBELIRER:** The obligation under Rule 34
23 runs to the party, Your Honor. The party has the obligation to
24 produce the documents. The attorney works with the party to
25 determine what the appropriate scope of the search would be,

1 and the party authorizes or, as Your Honor points out, does not
2 authorize whatever search. The obligation is on the party to
3 respond to discovery.

4 **THE COURT:** What's your understanding of your
5 obligation to the Court under Rules 1 and 26 as counsel?

6 **MR. OLSZEWSKI-JUBELIRER:** The obligation under Rule 26
7 is, in responding to discovery, the attorney needs to sign
8 responses that represent the factors under Rule 26.

9 When a party responds to interrogatories, for example,
10 those interrogatories are not verified by the attorney.
11 They're verified by a client. The client is responding to
12 discovery, not the attorney.

13 **THE COURT:** So you're saying under Rule 34, an
14 attorney has no obligation to go search for documents from its
15 client?

16 **MR. OLSZEWSKI-JUBELIRER:** What I'm saying, Your Honor,
17 is that the party has the obligation to search for the
18 documents. The attorney, in the course of the representation,
19 determines what the scope of that search is with the client,
20 and the client authorizes a search or doesn't authorize a
21 particular search. The client controls the documents, not the
22 attorney. I should say, the party controls the documents in
23 the context of Rule 34.

24 **THE COURT:** Well, okay. That's a given. But are you
25 taking the view that a client can simply refuse to search and

1 produce documents and their counsel is powerless to do anything
2 to get the documents from their client and has no obligation to
3 the Court to try to get the documents from their client? Is
4 that your view of how the Federal Rules of Civil Procedure
5 work?

6 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, my view is that
7 the party has the obligation to produce the documents and to
8 conduct whatever reasonable search is appropriate.

9 The Court could take measures against the party, but it is
10 really the party that controls the documents and has the
11 obligation to respond to discovery.

12 **THE COURT:** So, in your view, an attorney has no
13 professional responsibility to try to get the documents from
14 their client? They're able to sit on their hands -- the lawyer
15 is able to sit on their hands and say "I don't have to do
16 anything further if the client tells me I'm not going to get
17 the documents." Is that your view of how discovery works in
18 federal court?

19 **MR. OLSZEWSKI-JUBELIRER:** I think, Your Honor, the
20 client may be subject to sanctions if they refuse, after a
21 motion to compel, to produce documents subject to a court
22 order.

23 The attorney has the obligation to represent their client
24 appropriately and to inform the client, if they have a legal
25 obligation to search and produce documents, to do that search

1 and to work with the client to develop that search. But it is
2 the client that has the control over the documents, the party.

3 **THE COURT:** So if the Court were to find that a lawyer
4 could simply do nothing in response to an obstreperous client,
5 could just sit back and let the client refuse to produce
6 documents, you don't think the Court has the ability or the
7 power to sanction that lawyer?

8 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, I'm honestly
9 struggling a little bit with what the -- what the lawyer would
10 have done wrong in this case.

11 The issue is, the party has the obligation to produce the
12 documents. If the party refuses to comply with discovery, they
13 may be subject to sanctions. The lawyer has the obligation to
14 inform the party of that outcome. But it's really the party
15 who has the obligation to respond to discovery.

16 **THE COURT:** An attorney has their own independent
17 responsibility, as an officer of the court, to try to get the
18 documents from their client; right?

19 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, an attorney has
20 an obligation to -- if they have an obligation to try to get
21 documents from the client is not the question under
22 *Citric Acid*. It is not --

23 **THE COURT:** Do they or do they not have an obligation,
24 as an officer of the court and under their duties under the
25 ethics rules, to try to get the documents from their clients in

1 response to discovery requests?

2 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, they have an
3 obligation under the rules of professional responsibility to
4 represent their client appropriately, to inform the client what
5 the obligations of the rules of discovery provide for, what
6 reasonable search would be required.

7 **THE COURT:** In the hypothetical where the client --
8 and you're saying the client can get sanctioned. The reason
9 the client is getting sanctioned is because the lawyer had the
10 right and the obligation to get the documents; right?
11 Otherwise --

12 **MR. OLSZEWSKI-JUBELIRER:** Do not have the right to get
13 the documents.

14 **THE COURT:** There wouldn't be any sanctions otherwise.

15 **MR. OLSZEWSKI-JUBELIRER:** Because -- no. My
16 apologies, Your Honor.

17 If the client is being sanctioned it's because the client,
18 the party, has refused to produce the documents.

19 **THE COURT:** And the reason they're getting sanctioned
20 is because their view that their lawyer has no right to get the
21 documents is incorrect; right?

22 **MR. OLSZEWSKI-JUBELIRER:** No. Your Honor, they would
23 be sanctioned because they need to produce the documents and
24 they're not producing the documents.

25 **THE COURT:** Because they should have listened to their

1 lawyer and let the lawyer come in and get the documents; right?

2 **MR. OLSZEWSKI-JUBELIRER:** Yes. Exactly, Your Honor.
3 And that is the party's decision, not the attorney having the
4 unilateral right to go and search through a client's documents
5 and certainly not, Your Honor, to search through a client's
6 documents in order to respond to discovery in which the client
7 is not a party to the case.

8 **THE COURT:** Putting aside whether they're a party to
9 the case or not, I'm troubled by your view here. The reason a
10 party is sanctioned for refusing to hand over or even allow
11 their lawyer to get documents is because they are wrong,
12 because the lawyer has the right, in fact, the duty and
13 obligation to go get the documents; right?

14 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, the reason they
15 would be subject to sanctions is because they are not producing
16 the documents.

17 **THE COURT:** Because their lawyer has the right and
18 duty and obligation to this Court to go get the documents in
19 accordance with the Federal Rules of Civil Procedure; right?

20 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, because the
21 lawyer has the obligation to represent the client and, as part
22 of that representation, to try to get the documents from the
23 client. But the client controls the documents and determines
24 what they will produce.

25 **THE COURT:** And the sanctions are there to enforce and

1 reinforce the fact that the lawyer should have and has the
2 obligation to get the documents in the first place.

3 **MR. OLSZEWSKI-JUBELIRER:** The sanctions, Your Honor,
4 would run against the party. These agencies are not parties to
5 this case.

6 **THE COURT:** But what I'm talking about is whether the
7 lawyer has an obligation and a right to get the documents. The
8 only reason the party is being sanctioned is because the lawyer
9 has that obligation.

10 **MR. OLSZEWSKI-JUBELIRER:** The lawyer does not have the
11 right to get the documents. They may have the obligation to
12 try to get the documents.

13 **THE COURT:** Okay. I understand your argument. I'm
14 troubled by your views of how discovery runs under the Federal
15 Rules of Civil Procedure and what you think lawyers can do and
16 sit on their hands and not do.

17 Okay. Have you or anyone in your office communicated with
18 any of the listed agencies as to whether they are requesting
19 exemption from the statutory scheme so they can get consent to
20 hire different lawyers?

21 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, there's a
22 process by which the Attorney General's Office would -- when an
23 agency receives a subpoena, there's a process by which they
24 would have this discussion with the Attorney General's Office,
25 either request representation from the Attorney General's

1 Office or request that they use their own in-house counsel or
2 hire a private outside counsel.

3 No subpoenas have been served on these agencies, and
4 therefore, that process has not occurred.

5 **THE COURT:** Have any of these listed California
6 agencies been involved in the investigation of this matter?

7 **MR. OLSZEWSKI-JUBELIRER:** No, Your Honor, they have
8 not.

9 **THE COURT:** Your briefing relies on *Lockyer*. You
10 would agree *Lockyer* is not applying the *Citric Acid* test?

11 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, *Lockyer*,
12 I think, answers the questions under the *Citric Acid* test.

13 **THE COURT:** Please answer the Court's question before
14 you make your argument.

15 *Lockyer* is not applying the *Citric Acid* test; correct?

16 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, *Lockyer* does not
17 cite *Citric Acid*. I think the relevant issues are whether --
18 whether the People, the plaintiff in this action, encompassed
19 the agencies -- *Lockyer* says no -- and whether -- very
20 specifically, whether the People have control over those
21 documents --

22 **THE COURT:** Is this --

23 **MR. OLSZEWSKI-JUBELIRER:** -- from those agencies.

24 **THE COURT:** -- Court bound by California state law for
25 discovery purposes?

1 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, the Court is
2 bound by California state law to the extent the Court is making
3 decisions about what California state substantive law allows
4 the Attorney General to do.

5 **THE COURT:** California discovery rules, is that
6 substantive law?

7 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, the ruling in
8 *Lockyer*, I think, goes to the question of who are parties under
9 California law when the Attorney General brings an enforcement
10 action --

11 **THE COURT:** Again, answer my question.
12 Is California -- are California discovery rules
13 substantive law?

14 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, the discovery
15 rules are not substantive law, but the underlying ruling about
16 who has control is substantive law.

17 **THE COURT:** I'll ask you again. Did the *Lockyer* court
18 examine *Citric Acid* and apply and analyze the control test?

19 **MR. OLSZEWSKI-JUBELIRER:** The *Lockyer* court does not
20 cite *Citric Acid*, as I said, Your Honor; but the *Lockyer* court
21 is very clear that the People do not have custody or control
22 over the documents of state agencies in this posture when
23 they're bringing an enforcement action.

24 I will say, Your Honor, the other two -- two of the other
25 cases that we cite, *Warner Chilcott* and *American Express*, do

1 also expressly apply *Citric Acid's* legal control test, and they
2 both find that there's no control.

3 If I can step through them really briefly, *American*
4 *Express* takes on the exact same argument that Meta is making
5 here. *American Express* says when the Attorney General is
6 bringing an enforcement action, even if the Attorney General
7 might represent some state agencies in responding to a
8 subpoena, that attorney-client relationship does not give the
9 Attorney General control over those agencies' documents.

10 In *Warner Chilcott*, which is a case where the -- a
11 multistate enforcement action, just like this one, where the
12 California Attorney General was a party, for the purposes of
13 the discovery, involved in the enforcement action, *Warner*
14 *Chilcott* also finds that the Attorney General does not have
15 control over state agency documents. The argument there was
16 quite similar to the one -- the argument that Meta is making
17 here. The argument there was that by virtue of the
18 Attorney General's role as the chief law enforcement officer,
19 therefore, they must have control over state agency documents,
20 and the Court rejected that.

21 **THE COURT:** *Lockyer* is not binding on this Court;
22 correct?

23 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, I think *Lockyer*
24 is the definitive representation of who are parties in an
25 enforcement action under 17200 and 17500, the same statutes

1 here, and whether the plaintiff, the party, has control over
2 those documents.

3 **THE COURT:** Well, *Lockyer* is a Court of Appeals --
4 District Court of Appeals decision. It's not a California
5 Supreme Court decision; right?

6 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, my understanding
7 of how the federal courts are bound by state law is that the
8 federal court is -- needs to predict what the state court would
9 do in the situation. Right?

10 We know what the state court will do. This is the
11 definitive decision under California state law on this issue.

12 **THE COURT:** Are you advocating that I engage in some
13 kind of Erie doctrine, as if I'm sitting in diversity, and
14 figure out what California law is here?

15 **MR. OLSZEWSKI-JUBELIRER:** I think we know what
16 California law is because *Lockyer* says what California law is.

17 **THE COURT:** *Lockyer* says what California law is in the
18 Fourth Appellate District, which is not even the district I sit
19 in if we were looking geographically; correct?

20 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, my understanding
21 is the Court of Appeals' decisions are binding on all lower
22 courts in California.

23 **THE COURT:** Am I a lower court in the California state
24 system?

25 **MR. OLSZEWSKI-JUBELIRER:** You're not, Your Honor.

1 **THE COURT:** I forget if I've asked. Under California
2 law, how would monetary relief, if any, be awarded or allocated
3 at the end of all this?

4 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, there are two
5 forms of monetary relief here.

6 One is civil penalties. California law is very specific
7 on this. This is Business and Professions Code 17206,
8 I believe. And it says civil penalties -- my apologies,
9 Your Honor. 17206, paragraph (c)(4) (as read):

10 "The aforementioned funds" -- the civil
11 penalties -- "shall be for the exclusive use by the
12 Attorney General, the district attorney, the county
13 counsel, and the city attorney for the enforcement of
14 consumer protection laws."

15 So civil penalties are paid into -- half of the civil
16 penalties are paid to the treasurer of the county where the
17 judgment is entered, half go to the general fund, and they are
18 all for the exclusive use of the Attorney General for consumer
19 protection and enforcement.

20 There's also a disgorgement remedy. That's a new statute,
21 Government Code 12527.6. And those disgorged funds go into a
22 special fund, which is for the exclusive use of compensating
23 consumers. It's designed to compensate consumers, to provide
24 restitution to them in cases brought by the Attorney General
25 where the defendant does not have the ability to pay and

1 satisfy all the restitution that would be ordered in those
2 cases.

3 **THE COURT:** Okay. Response from Meta?

4 **MR. CARPENTER:** Thank you, Your Honor.

5 Just to clear up some of the statutory issues, as we said
6 in our brief, under California state law, the AG has charge of
7 all legal matters. All but one, the Department of Education,
8 of the agencies we're talking about here today are
9 affirmatively prohibited from hiring other counsel unless the
10 AG signs off on it.

11 I think that's partially important -- important, in part,
12 because if we're talking about a right to control, the AG can
13 then exercise that right to take over the litigation and can
14 decline to exercise its discretion not to.

15 On the *Lockyer* point, yes, *Lockyer* did not apply a right
16 to obtain test, didn't apply the *Citric Acid* test. *Lockyer*
17 began and ended its analysis by asking whether the two agencies
18 were created as separate, and that is all.

19 On *Warner Chilcott* and *American Express*, which counsel
20 also referenced, I think those are just misreadings of those
21 cases. The relevant part of *Warner Chilcott* didn't apply the
22 right to obtain test. Much like *Lockyer*, the relevant part
23 said because they're created separately and not under the same
24 executive control, which as we talked about earlier is not
25 required, there was no control under that court's test.

1 There's another part of that case counsel may be
2 referencing that had to do with accessing some very specific
3 Medicaid data where the Court looked at a particular statutory
4 scheme, but that's different than what we're dealing with here.
5 The part of that opinion we're fighting over didn't analyze it,
6 nor did *American Express*. It, once again, said they're under,
7 quote, common executive control and didn't look at all at the
8 statutory framework or what courts like *Generic* and *Shelby*
9 County have done in the years since those decisions were
10 decided more than a decade ago.

11 **MR. OLSZEWSKI-JUBELIRER:** If I may respond,
12 Your Honor.

13 **THE COURT:** Sure.

14 **MR. OLSZEWSKI-JUBELIRER:** A few points.

15 So, first of all, I think perhaps we're talking past each
16 other a little bit on *Warner Chilcott* and *American Express*.
17 Your Honor, I'm sure, has read the cases. I'm quite confident
18 there are different sections in those opinions.

19 One section is about whether the agencies are parties. We
20 take Your Honor's instruction that you're not deciding the
21 agencies as being parties. I think the section that counsel is
22 referring to is in that section about whether they're separate
23 entities.

24 Both of those cases also go on to say the question that
25 the Court is deciding here, whether the Attorney Generals have

1 control over documents at those agencies; and both of those
2 cases expressly apply the legal control test and say that the
3 AGs do not have legal control over those documents.

4 To take another point that Meta's counsel referred to,
5 Meta's counsel said all these cases just talk about whether
6 those agencies are separate entities from the Attorney
7 General's Office. And I think *Citric Acid* is quite instructive
8 on this point.

9 Citric Acid itself says, in referring to the *International*
10 *Union* case that *Citric Acid* built on and in that case itself,
11 says these two entities are separate entities and there's
12 nothing that expressly gives the target of discovery the legal
13 right to obtain the documents of this other non-party on
14 demand.

15 And that is really the test. All of these agencies are
16 separate from the Attorney General's Office. They are not
17 controlled by the Attorney General. They are controlled by
18 separately, independently elected officers: the Governor,
19 the superintendent of public instruction, other officials. The
20 Attorney General does not have control over those agencies and
21 does not have control over their documents.

22 If I could return really briefly to the virtual veto
23 discussion that was being done in the prior argument, we also
24 raise this concern. The concern, Your Honor, is that we, as
25 the attorneys prosecuting this case, do not have the ability,

1 the legal right to obtain documents from these agencies on
2 demand. If they refuse to produce those documents, we,
3 the People of the State of California, the party that's here,
4 we, as the attorneys, potentially would be subject to sanctions
5 to try to get document -- for our inability to produce
6 documents that we -- that we just don't have the ability to
7 force those agencies to produce those documents.

8 It's exactly what *Citric Acid* said it was trying to avoid
9 by adopting the legal control test. You don't want, under the
10 Rules of Civil Procedure, to order a party to produce documents
11 that they cannot obtain on demand, that they don't have a legal
12 right to obtain on demand from non-parties. That's exactly
13 what *Citric Acid* said the legal control test is trying to
14 avoid.

15 **THE COURT:** Again, if that's what you mean by "virtual
16 veto," I still don't really understand it because it's
17 circular. You're assuming that you don't have control over the
18 documents and don't have a right to access, which means then
19 there is no control in *Citric* and then there's no obligation to
20 get them; right?

21 But the only reason you would be required to get them,
22 hypothetically, is if the Court found there is a legal right to
23 access and there is a right to -- in other words, the control
24 test is satisfied.

25 And so in your hypothetical, again, if the obstinate

1 client or party in this case, non-party agency in this case
2 refused to somehow cooperate with you, despite a court order
3 saying, "Go get the documents," you are not powerless. You can
4 come to court and ask for orders and sanctions. And there are
5 all sorts of ways available to you as counsel to essentially
6 work with the Court to persuade your client to comply with
7 their discovery obligations; no?

8 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, those
9 non-parties, as you mentioned, Your Honor, are not parties.
10 And so the concern about the virtual veto is that the
11 Attorney General would be put in a situation where the
12 Attorney General, as the representative of the party, the
13 plaintiff, would be obligated to try to get documents from an
14 agency that they don't control, that they cannot obtain those
15 documents on demand.

16 Your Honor, if the Court ordered --

17 **THE COURT:** Again, if the Court hypothetically found
18 there's no ability and there's no control, then there's no
19 asking for the documents; right? You don't even get there.
20 It's circular, or it's -- I don't know. It's -- in other
21 words, the only reason counsel would be required to go to the
22 non-party to get documents is because the Court found there was
23 control under *Citric Acid*.

24 **MR. OLSZEWSKI-JUBELIRER:** And there is not control
25 under *Citric Acid*, right.

1 **THE COURT:** But to combine the two irreconcilable
2 parts of a hypothetical into one doesn't make sense. In other
3 words, if the Court finds there's control, then as counsel,
4 you'd be obligated to go get the documents; right?

5 **MR. OLSZEWSKI-JUBELIRER:** We would be obligated to try
6 to get the documents. But as I explained, Your Honor, we do
7 not have the ability to get those documents.

8 **THE COURT:** Again, you go to the non-party and say,
9 "Look, the Court has ordered, found control -- we don't think
10 the Court's right -- but found control, and therefore we need
11 to get the documents from you."

12 And I don't see where veto comes in. The concern is
13 somehow the agency would say, "No, we're not going to let you
14 get our documents. We're just going to refuse."

15 You, as counsel to the party in this case -- and, again,
16 in this hypothetical, the only way it gets there is if
17 the Court has found control -- would come to court. You have
18 all sorts of avenues available to get the Court to work with
19 you to convince the agency to produce the documents; no?

20 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, we've gone,
21 I think, a little bit far down a hypothetical road. I'm not
22 certain that the Court -- I'm not certain what the Court's
23 ability would be to sanction a non-party, who is not a party to
24 the litigation, for refusing to give documents which they don't
25 have a legal right --

1 **THE COURT:** If the Court found that there is control
2 and ordered you to go to some agency and get the documents, are
3 you saying I don't have the ability, then, to -- on the basis
4 of that order, to sanction that third party? They're subject
5 to the discovery under -- in this hypothetical; right? There's
6 been a finding that there's control and that they're subject to
7 the discovery. And so if they're subject to the discovery,
8 then they're subject to the sanction power of the Court.

9 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, they would be
10 subject to discovery only in the sense that the party who's
11 actually the party, we, would be subject to discovery to try to
12 get documents from somebody else.

13 **THE COURT:** That's what all control cases are about.
14 That's what all *Citric Acid* cases -- it's always a third-party
15 who's not a party to the case; right?

16 So the only reason -- they're not a party to the case. So
17 the only reason that somebody is going to the non-party to get
18 documents is because some court has found that there is a legal
19 right to access them from the non-party. And so the non-party
20 could try to say, "Well, I'm going to refuse."

21 But I just don't see the hypothetical -- I still don't see
22 where the veto is, I guess. I'm not sure who's being vetoed
23 and that's being vetoed.

24 **MR. OLSZEWSKI-JUBELIRER:** I think the veto -- and to
25 be frank, Your Honor, this actually comes from a case that Meta

1 cited in the prior -- that they relied on in the prior letter
2 briefing.

3 **THE COURT:** Well, your colleagues all used the phrase
4 "virtual veto" --

5 **MR. OLSZEWSKI-JUBELIRER:** Yes.

6 **THE COURT:** -- as a concern.

7 **MR. OLSZEWSKI-JUBELIRER:** Absolutely.

8 **THE COURT:** I still don't understand what's being
9 vetoed and what the concern is.

10 **MR. OLSZEWSKI-JUBELIRER:** So just to explore this
11 really briefly, it comes from a case where the Court was
12 deciding whether, when the U.S. Government brings an antitrust
13 enforcement action -- in this case, against AT&T -- the Court
14 said: Well, DOJ is part of the executive branch. In this
15 particular situation, AT&T has contracts with literally every
16 agency of the Government. We'll say in this massive antitrust
17 action, in this particular case, party discovery is appropriate
18 as to executive agencies, but it is not appropriate as to
19 independent agencies that are not subject to the direct control
20 of the president -- FTC, FCC, those sorts of agencies --
21 because the concern is -- and bringing it back to the state
22 situation, the Attorney General of the State of California has
23 an independent authority to bring these consumer protection
24 enforcement actions. If, in bringing such an action, every
25 single agency that they don't control -- or in the *AT&T* case,

1 FCC, FTC -- could refuse to produce documents and, therefore,
2 subject the actual party, who's the party in the case, the
3 U.S. Government -- or here, the People of the State of
4 California represented by the Attorney General -- to sanctions
5 for their failure to produce documents from some agency they
6 don't control. It would be a veto over their independent
7 ability to bring that enforcement action.

8 The Attorney General would need to get buy-in from all
9 these agencies that they don't control before bringing an
10 action and saying: Can we agree that you would give documents,
11 that you would be subject to party discovery in advance?

12 But that's not how the California Constitution works,
13 the Court in *AT&T* said that's not how the federal Constitution
14 works, because the Attorney General is independently elected,
15 does not control these agencies, and has to have the ability to
16 pursue his independent authority to enforce the consumer
17 protection laws.

18 **THE COURT:** So the virtual veto argument is
19 hypothetical. In other words, none of the California agencies
20 have refused to cooperate in discovery here; right?

21 **MR. OLSZEWSKI-JUBELIRER:** None of the California
22 agencies are subject to discovery here. None of -- no
23 subpoenas have been served on them. The RFPs --

24 **THE COURT:** Let me rephrase it.

25 You haven't asked and, therefore, you have no idea whether

1 any of these California agencies would refuse to cooperate
2 voluntarily in discovery; right?

3 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, I don't. But
4 the point is, under *Citric Acid*, just trying to get them to
5 cooperate voluntarily is not enough for control. We don't have
6 the ability to force them to give us documents.

7 **THE COURT:** Although if they all voluntarily
8 cooperated, we'd moot this entire dispute; right?

9 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, I think that's
10 an important point and one I did want to mention. We could
11 have mooted this entire dispute if Meta just served Rule 45
12 subpoenas months ago.

13 I do just want to make one point about the practicalities.
14 There is another MDL that's pending currently in the Northern
15 District of California. That's the In Re Google Play Store
16 Antitrust Litigation. It's 3:21-MD-2981. That involves a
17 multistate enforcement action by 37 State Attorneys General.
18 And the same dispute came up in that case.

19 Google, who's the defendant in that case, asked the
20 Attorneys General: We want to get some information from all
21 your state agencies. The State Attorneys General had the same
22 position we do here. Rule 45 is the only appropriate way to do
23 that. And Google avoided this entire dispute; they went ahead
24 and served their subpoenas. In that case, they served
25 subpoenas on four California state agencies, including one of

1 the ones that is on Meta's list here, the Department of Public
2 Health. None of those agencies were represented by the
3 Attorney General's Office in responding to those subpoenas.

4 **THE COURT:** Well, you heard me ask Meta's counsel, and
5 you should confirm, they voluntarily chose not to serve Rule 45
6 subpoenas and, instead, chose this way. And everybody is fully
7 aware of the fact discovery cutoffs and deadlines here; and I
8 don't think -- I certainly don't have the power to extend any
9 fact discovery deadlines based on arguments of delay and time
10 taken to enforce subpoenas. So that's an issue they'd have to
11 take up with Judge Gonzalez Rogers if it became one.

12 But that was their -- that was their choice. That's why
13 we're here. So I hear what you're saying, but they've made
14 that tactical choice here, and they may -- if I rule against
15 them, they may live to regret it.

16 Turning to you --

17 **MR. CARPENTER:** Thank you.

18 **THE COURT:** -- on that note.

19 **MR. CARPENTER:** Yes, a good note to turn on.

20 On the virtual veto concern, I think it's sufficiently
21 addressed by the cases we cite in the briefing, like I said
22 before, for the most part.

23 But just to say, once again, a state choosing to decline
24 valid federal discovery orders doesn't do anything to stop the
25 state AG from filing suit in the first place. And both the AG

1 and Your Honor would have any number of tools to compel
2 compliance. I also think it would be surprising to me if the
3 California government decided to start doing that, I guess is
4 the way I would put it.

5 On the two federal cases that counsel referenced, I think
6 they speak for themselves. They didn't employ the legal right
7 to obtain test, and I think that's just there in their text.

8 On the point that we could have mooted it, just to be
9 clear, I mean, we're not dealing with four agencies here.
10 We're dealing with many hundreds because 35 separate
11 Attorneys General brought suit. But I think what a lot of the
12 cases we've cited show is that third-party discovery is often
13 not an adequate substitute for party discovery, especially in
14 situations like this.

15 Finally, to just return to the virtual veto concern for
16 one second, it doesn't affect -- or at least shouldn't
17 affect the legal right to obtain test, even if the Court were
18 persuaded by it. It has nothing to do with whether the AG
19 practically can obtain them.

20 To the extent it's a practical concern -- and we don't
21 think it's a concern at all -- we agree it's both
22 speculative and not very -- we agree with the courts that have
23 said it's both speculative and not very persuasive.

24 But to the extent it's a concern and to the extent we're
25 concerned about practicalities, I think what many cases,

1 including the one that I referenced earlier about the Voting
2 Rights Act out of Texas, have recognized is that there actually
3 is a practical problem here; and it would be with states having
4 the ability to prevent otherwise valid discovery through party
5 discovery means just by housing those documents in different
6 agencies, which was the concern in the Voting Rights Act in
7 Texas.

8 I think with that, nothing further from us on California.

9 **THE COURT:** Okay. Yeah. On the -- I just want to --
10 this is really more of a -- well, maybe it's a question too.

11 No one's -- I mean, the list of agencies from whom Meta
12 wants to take discovery, nobody forces you to take discovery
13 from all of them. That's what you chose; right?

14 **MR. CARPENTER:** Correct, Your Honor. But I think it's
15 fair to think that all of them -- we didn't choose every agency
16 in government. We chose them based on the ones we think may
17 potentially have relevant information, and I would submit that
18 we should be able to determine that through the ordinary course
19 of discovery.

20 **THE COURT:** I mean, for example, you could have
21 prioritized -- there was nothing stopping you from serving at
22 least a few subpoenas to prioritize the agencies you really
23 wanted to go after first; right? You could have prioritized a
24 few agencies. In other words, it doesn't have to be done as an
25 all-or-nothing thing; right?

1 **MR. CARPENTER:** I think with the number we're dealing
2 with and with the speed of the suit, party discovery is more
3 efficient just as a general matter; and so it made sense that
4 we would do that with this number, given the number of AGs
5 who've sued.

6 **THE COURT:** You understood you made the tactical
7 choice not to serve the subpoenas, even a subset of the
8 subpoenas that you could prioritize earlier in the case; right?

9 **MR. CARPENTER:** That's right, Your Honor.

10 **THE COURT:** Okay.

11 **MR. OLSZEWSKI-JUBELIRER:** Just one really brief point,
12 Your Honor.

13 The *Google* case that I was referring to, Google -- there's
14 a case management statement where Google, describing its
15 dispute, Google says that they informed the Attorneys General
16 that they were planning to serve over a hundred subpoenas to
17 state agencies immediately after that dispute arose.

18 So I certainly agree with Your Honor's point that they
19 could have served subpoenas on a subset of agencies that they
20 were really interested in getting documents from. They could
21 have done that while they're still litigating this dispute over
22 who is subject to party discovery. They made a tactical choice
23 to not go down that route and get that discovery more directly.

24 **THE COURT:** Yeah. The only -- I point out, your
25 colleagues may not be happy with you raising an antitrust MDL

1 case as something to look at when they're trying to distinguish
2 the *Generic Pharms* case on that basis. That was an antitrust
3 case.

4 **MR. OLSZEWSKI-JUBELIRER:** Your Honor, I think the
5 point I'm trying to make here is just that it's not completely
6 impractical, in a large enforcement, multistate enforcement
7 action, to serve subpoenas. I think the core issue is we don't
8 have control over these documents.

9 **THE COURT:** Anything further on California from either
10 side?

11 **MR. CARPENTER:** Nothing from Meta.

12 **MR. OLSZEWSKI-JUBELIRER:** Nothing from the People,
13 Your Honor.

14 **THE COURT:** All right. Submitted on California.

15 So, and as I understand it, all the states that have not
16 asked for oral argument are resting on the pleadings; right?

17 **MS. MIYATA:** That's right, Your Honor.

18 Bianca Miyata from the State of Colorado for the
19 State AGs.

20 However, there are three brief points that the judge --
21 that the Court brought up today and that Meta has had an
22 opportunity to address that I would like to touch on very
23 briefly --

24 **THE COURT:** Okay.

25 **MS. MIYATA:** -- with the Court's indulgence.

1 **THE COURT:** Okay. But Colorado didn't ask for oral
2 argument.

3 **MS. MIYATA:** That is correct, Your Honor; but these
4 are directly responsive to, I think, questions that the Court
5 has posed of my five sister states today.

6 **THE COURT:** I'm teasing. You can go ahead.

7 **MS. MIYATA:** Thank you. I appreciate that.

8 One question that the Court has asked my colleagues today
9 is whether or not we represent the client agencies' interests
10 in this matter. And when I say "the client agencies," I should
11 better say the state agencies' interests.

12 To provide an abundance of clarity, we do not do so,
13 either in this dispute or in this action generally. There are
14 a couple limited exceptions. I think my colleague from
15 New Jersey touched upon the unique relationship with their
16 Division of Consumer Affairs. I believe that there is another
17 state in our coalition, Hawaii, who also has a similar unique
18 relationship. But generally speaking, we are not here today to
19 speak for the state agencies.

20 And absent an attorney-client relationship with those
21 agencies, we do not have an obligation to notify them of
22 discovery received that may purport to demand their documents.
23 In fact, it would be improper.

24 **THE COURT:** We'll move to the attorney-client.

25 **MS. MIYATA:** Please.

1 **THE COURT:** You would agree that the arguments being
2 advanced by the State AGs are aligned with the interests of the
3 state agencies? Whether they're intended to or not, they are
4 aligned with the interests of the state agencies?

5 **MS. MIYATA:** Your Honor, I actually could not speak to
6 that. I am not aware of the priorities advanced by our state
7 agencies, nor am I familiar with their particular clients'
8 goals.

9 **THE COURT:** Would you admit that the arguments
10 presented by the state AGs, if they prevail, would inure to the
11 benefits of the state agencies?

12 **MS. MIYATA:** Again, I can't speak to that. I think
13 that may be true for some agencies, but it may not be true for
14 others.

15 **THE COURT:** Then why are you fighting if it wouldn't
16 advance any interest?

17 **MS. MIYATA:** Well, Your Honor, I think we are not in a
18 position to be -- this goes back, I think, to the question of
19 control.

20 And I don't want to belabor the arguments that the Court's
21 already read in briefs and already heard from my colleagues.
22 But the Attorneys Generals' Offices do not have control under
23 *Citric Acid*. I think you've read, in 35 various single-page
24 letter briefs, that we don't have control over these state
25 agency documents, either under *Citric Acid* or even considering

1 a practical ability test, which we heard suggested today.

2 The parties discussed that there are no statutes that
3 grant the Attorney Generals' Offices legal access to those
4 documents and much -- when they represent those client
5 agencies. And there are certainly no statutes that grant the
6 Attorney Generals' Offices access to client agency documents
7 when acting in their separate, independent enforcement
8 capacity, which is something different and delineated in many
9 states by statute. There are these two different ways in which
10 the Attorney General may operate.

11 **THE COURT:** Okay. So you said something that, again,
12 I -- you said that there's no statute that grants the AGs'
13 counsel's access to documents, even when they represent those
14 client agencies.

15 **MS. MIYATA:** I think -- if I may restate what
16 I believe I said.

17 I don't believe that there are statutes that grant the
18 Attorney Generals' Offices legal access to the documents, by
19 which I mean access upon demand. While the attorneys who
20 represent those clients may certainly advise their clients
21 about what to produce, there's a difference between that and
22 the Attorney General, when acting in its separate enforcement
23 capacity of the consumer protection laws, having the legal
24 right to demand production of those documents from client
25 agencies.

1 **THE COURT:** So just so I'm clear, because we had this
2 discussion with your colleague for California --

3 **MS. MIYATA:** Correct.

4 **THE COURT:** -- when, hypothetically, an
5 Attorney General is representing an agency in federal court, do
6 not the Federal Rules of Civil Procedure give the
7 Attorney General the legal basis to get documents from their --
8 in that hypothetical, the state agency client?

9 **MS. MIYATA:** I would say that the Rules of Civil
10 Procedure give that attorney the very serious obligation to
11 advise and guide the client as to what their obligations are
12 under the Federal Rules of Civil Procedure and to engage with
13 the Court with candor about the extent to which those
14 conversations have taken place.

15 I would not agree that the attorney has the independent
16 ability to somehow retrieve those documents from the client
17 against the client's will, should that situation ever
18 transpire, which we hope it does not.

19 **THE COURT:** But, again, the purpose of the Court's
20 enforcement procedures or enforcement powers in that case is to
21 vindicate the attorney's right to go in and get the documents.

22 **MS. MIYATA:** Your Honor, respectfully, I would see
23 that rule and its purpose perhaps a little bit differently.

24 My understanding is that the purpose of that rule is to
25 ensure that the party can engage in litigation and fulfill its

1 obligations, not necessarily to vindicate the attorney's
2 particular relationship or role when it comes to the client.

3 And that is not to make light of the attorney's very
4 serious obligation and role that they play in this system of
5 counseling the client, vigorously -- vigorously persuading the
6 client about what the client's obligation is to provide those
7 documents.

8 But ultimately, the decision as to how to comply with
9 those rules and to what extent the client wishes to produce
10 documents remains the client, as we are the adviser and the
11 guide. We do not serve in the client's stead.

12 **THE COURT:** Well, I mean, again, we serve as the
13 adviser and guide. We do not serve what? In the client's?

14 **MS. MIYATA:** I would hesitate to say that as -- I
15 don't think that as a -- when I serve as the representative of
16 a client, I do not direct or control that client. I advise
17 that client as to their obligations under the rules of
18 this Court and the law.

19 **THE COURT:** You don't think, as a litigation counsel,
20 you have no legal ability to get documents from your client in
21 response to discovery?

22 **MS. MIYATA:** I do not believe that I have legal
23 control under *Citric Acid* over my client.

24 Of course -- and I will point out, that being a
25 hypothetical, because in this capacity I represent the state's

1 enforcement arm; I am not representing a client agency.

2 **THE COURT:** All right. Well, I understand your
3 arguments. I already made clear my views on this when I spoke
4 with your colleague for California. So, go ahead.

5 **MS. MIYATA:** Thank you, Your Honor.

6 If I may turn to another point, Meta -- I think there have
7 been questions brought up during the course of these arguments
8 regarding cases where courts have held that Attorney General
9 Offices may have had control over agency documents. And I'd
10 just like to highlighting that those are different cases with
11 different facts where agencies were involved in a way that
12 nobody has alleged here. It's not in the complaint. It's not
13 something Meta has alleged.

14 And I want to turn back to some of the comments that were
15 made about those particular documents when you inquired of Meta
16 about whether it was entitled to Rule 34 discovery. And they
17 said: Well, you know, there may potentially be some relevant
18 information that the agencies might know about that the
19 Attorney Generals' Offices, you know, may have considered in
20 drafting their complaint.

21 That's not sufficient under Rule 34 here. Just because
22 Meta is curious about what agencies may have known is not
23 enough to get over that bar.

24 And I just want to point the Court back to its order in
25 February. I think, as the Court's well aware, the parties have

1 been discussing this issue for the past four or five months
2 now. And back in February, the Court noted that party
3 discovery couldn't be had of agencies that the Attorney
4 General Office didn't represent acting in its enforcement
5 capacity.

6 And that remains true these many months later. So we ask
7 the Court to consider that in entering its ruling today.

8 **THE COURT:** Okay.

9 **MR. HALPERIN:** I'll be brief, Your Honor, and I'll
10 address both points.

11 First, with respect --

12 **THE COURT:** For the record, enter your appearance.

13 **MR. HALPERIN:** I apologize, Your Honor. Greg Halperin
14 from Covington & Burling on behalf of Meta.

15 I'll start with the point that's been raised again and
16 again through the five individual states and again here, that
17 the AGs don't have an ability to get documents from the
18 agencies.

19 *U.S. vs. AT&T*, it's 461 F.Supp. at 1334, Note 58,
20 expressly rejected that argument, saying, quote (as read):

21 ". . . defendants have even less influence over
22 the agencies, and as the entities which have been
23 sued, they are entitled to their discovery rights
24 irrespective of the effect on inter-departmental
25 relationships."

1 That's the exact retort to the argument we've heard again
2 and again, that the AGs don't have an ability with the Court's
3 order to get the documents. We, as Meta, have even less of an
4 ability.

5 Turning to the second argument, this idea that all we want
6 is curiosity over the documents and that somehow antitrust
7 cases are different from this one. To be sure, the AGs have
8 not brought suit on behalf of agencies; they're not seeking
9 damages on behalf of agencies. But that doesn't make the
10 discovery we're seeking any less relevant or entitle us to it
11 any less.

12 At paragraph 508 of their complaint, the AGs say that (as
13 read):

14 "Increased use of social media platforms,
15 including those operated by Meta, result in physical
16 and mental health harms, particularly for young
17 users."

18 We're seeking discovery from the physical and mental
19 health agencies of the states.

20 At paragraph 315 (as read):

21 "By sending notifications to young users, Meta
22 causes young users' smartphones to produce
23 audiovisual and haptic alerts that distract them and
24 interfere with young users' education and sleep."

25 We're seeking discovery from the Departments of Education.

1 On and on through their complaint, the allegations that
2 the states are making here put squarely at issue, just like
3 they did in the antitrust cases, the discovery we're seeking
4 from these agencies. So we just don't think it's relevant that
5 this isn't an antitrust case.

6 **THE COURT:** Okay. Everybody agrees relevance of the
7 discovery is not germane to the control issue under
8 *Citric Acid*, though; correct?

9 **MR. HALPERIN:** Absolutely, Your Honor.

10 **MS. MIYATA:** That's right, Your Honor, without
11 prejudice to being later -- being able to later raise that
12 objection.

13 **THE COURT:** Not in front of me today for the purpose
14 of this --

15 **MS. MIYATA:** Correct.

16 **THE COURT:** -- current dispute; right?

17 Okay. Anything further from the states or Meta?

18 **MS. MIYATA:** One thing in response to paragraphs 508
19 and 315, Your Honor, and then we'll rest, which would be that
20 the fact that the States -- the State Attorneys General have
21 alleged harm to consumers and that those consumers may
22 ultimately be serviced by particular state agencies doesn't
23 necessarily mean that the State Attorneys General are alleging
24 harm to those agencies.

25 And that's a critical distinction here that also goes to

1 the very purpose and the heart of the Consumer Protection Act.
2 We are allowed, in our protective capacity, to allege harms to
3 individuals, and those harms may take various forms.

4 **THE COURT:** Anything further?

5 **MR. HALPERIN:** No, Your Honor.

6 **THE COURT:** All right. I want to thank you all,
7 counsel, for a very long argument today.

8 I want to thank Madam Court Reporter for putting up with
9 us as well.

10 And I want to commend -- I think at least one counsel here
11 is a fairly junior attorney, and I want to commend everyone,
12 but particularly that lawyer, for a job well done and well
13 presented.

14 So thank you all for today, and an order will issue in due
15 course.

16 **MS. MIYATA:** Thank you, Your Honor.

17 **MR. HALPERIN:** Thank you, Your Honor.

18 **THE CLERK:** We're off the record in this matter.
19 Court is in recess.

20 (Proceedings adjourned at 4:37 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, May 8, 2024

Ana Dub

Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official United States Reporter